# APPENDIX

## Supreme Court of the United States

October Term, 1973
No. 72-1318

ARTHUR KRAUSE, Administrator of the Estate of Allison Krause, *et al.*,
*Petitioners*,

vs.

JAMES RHODES, *et al.*,
*Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition for Certiorari Filed March 29, 1973
Certiorari Granted June 25, 1973

# Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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### Docket Entries and Documents in Krause Case

**Docket Entries and Documents in Miller Case**



**Notated References to Opinions and Judgments Below, Krause and Miller Cases**

Civil Action No. C-70-544

# In the United States District Court

FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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ARTHUR KRAUSE,
Administrator of the Estate of Allison Krause,
Deceased,
*Plaintiff,*

vs.

GOVERNOR JAMES RHODES, *et al.*,
*Defendants.*

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## RELEVANT DOCKET ENTRIES

Proceedings

6/10/70 Complaint filed. Summons issued. 3 copies of each to Marshal.

7/ 6/70 Amended Complaint filed.

7/15/70 Summons retn. & filed. Served Robert Canterbury 7/1/70; served James Rhodes and Sylvester Del Corso 6/22/70. Fees $12.48.

8/11/70 Summons ret. & filed. Served Sylvester Del Corso & Robert Canterbury on 7/30/70; Served Gov. Rhodes on 7/28/70. Fees, $12.48.

8/17/70 Motion of defts. DelCorso, and Canterbury to dismiss or in alternative for change of venue with memorandum in support filed. Copies mailed 8/14/70.

8/17/70 Motion of deft. Gov. Rhodes for change of venue with memo. in support filed. Copies mailed 8/14/70.

8/17/70 Motion of deft. Gov. Rhodes to dismiss with memo. filed. Copies mailed 8/14/70.

9/22/70 Interrogatories of plaintiff to defts., Governor James Rhodes, Sylvester Del Corso, and Robert Canterbury, filed. Copies mailed 9/21/70.

1-18-71 Memorandum of law on behalf of plaintiff in opposition to deft's motion to dismiss filed. Copy mailed 1-19-71.

3- 5-71 Memorandum of the plaintiff in opposition to defendants' motion for change of venue filed. Oral hearing requested. Copy mailed 3-5-71.

3-16-71 Notice of the plaintiff of the taking of the depo. of Raymond Srp on 3-30-71 filed.

3-16-71 Motion of the plaintiff to compel defendants to answer interrogatories filed. Copy mailed 3-15-71.

4- 4-71 Motion of the plaintiff to compel witness to answer questions pursuant to R. 37 filed. Copy mailed 5-4-71.

5- 6-71 Answers of Gov. James Rhodes to pltf's interrogatories filed. Copy mailed 5-4-71.

5- 7-71 Answers of Defts. DelCorso and Canterbury pltf's interrogatories filed. Copies mailed 5-5-71.

5/27/71 Deft's Memorandum contra motion to compel *witness to answer to Fed. rules of Civil Procedure, Rule 37 filed. Copy mailed 5/26/71. *(witness Captain Raymond Srp)

6/ 2/71 Memorandum & Order filed. Connell, J. Complaint Dismissed at Pltf's cost. Copies to interested counsel.

6/25/71 Notice of Appeal by Pltf filed. Copies to Alloway, Brown & Sindell.

8/11/71 Certified record received in U.S.C.A. & filed 8/8/71. Case No. 71-1622.

2/12/73 True copy of Judgment from U. S. Court of Appeals affirming judgment of District Court filed.

2/12/73 Opinion from U. S. Court of Appeals filed. (Record Returned)

## AMENDED COMPLAINT IN KRAUSE CASE

(Filed July 6, 1970)

Civil Action No. C 70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

### AMENDED COMPLAINT FOR DAMAGES UNDER U.S.C. TITLE 42, SECTION 1983, AND FOR WRONGFUL DEATH

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### FIRST CAUSE OF ACTION

1. Plaintiff Arthur Krause is a citizen of the United States who resides in Churchill Borough, Pennsylvania, and is the only qualified, appointed and acting Administrator of the Estate of Allison Krause.

2. Allison Krause, plaintiff's decedent, was at all times hereinmentioned the daughter of plaintiff Arthur Krause,

and plaintiff's decedent was at all times hereinmentioned a citizen of the United States, and was an enrolled student at Kent State University.

3. Defendant Governor James Rhodes at all times hereinmentioned was the Governor and Chief Executive of the State of Ohio and the Ohio National Guard was under his command, authority, and control.

4. At all times hereinmentioned defendant Sylvester Del Corso was the Adjutant General of the Ohio National Guard, which is the military force of the State of Ohio.

5. Defendant Robert Canterbury was at all times hereinmentioned the Brigadier General and Assistant Adjutant General of the Ohio National Guard and was in direct command and control of the national guardsmen in question at the time of the occurrence referred to hereinafter.

6. This action arises under United States Code Title 42, Section 1983, and under the United States Constitution, which guarantees to all citizens Equal Protection of the Laws and Due Process of Law.

7. At all times hereinmentioned all defendants acted and conspired under color of statutes, ordinances, regulations, customs and usages of the State of Ohio.

8. On or about May 4, 1970, defendants individually and jointly ordered units of the Ohio National Guard onto the Campus of Kent State University, which is an educational institution operated and controlled by the State of Ohio, and which is located in Portage County, in the State of Ohio.

9. Defendants ordered troops which they knew were equipped with guns loaded with live ammunition onto the Campus of Kent State University at a time when:

(a) Defendants knew there was no cause, or insufficient cause, for sending armed troops at said time into said place; and

(b) Defendants knew said troops were not properly trained in the correct and reasonable use of loaded weapons when in the presence of civilians not similarly armed; and

(c) Defendants knew that the presence of such troops, so improperly trained, and so armed, under the circumstances created an unreasonable danger on the campus of Kent State University, creating an imminent risk of injury and death to all students then on the campus, including plaintiff's decedent, Allison Krause.

10. The ordering of these improperly trained and armed troops onto the Kent State Campus, on the part of these defendants in complete and utter indifference and disregard for the lives of students on the Kent State Campus, including plaintiff's decedent Allison Krause, constituted culpable, gross, wanton and reckless misconduct under the circumstances and arbitrarily, discriminatorily and capriciously deprived plaintiff and plaintiff's decedent of their rights to Equal Protection of the Laws and Due Process of Law guaranteed under the United States Constitution.

11. On the afternoon of May 4, 1970, a group of students gathered together on the campus of Kent State University. Plaintiff's decedent, Allison Krause, was present at or near the gathering of students but at no time did she engage in any provocation or form of violence towards any individual or national guardsman. At the time, the national guardsmen, as described above, under the command of defendant Robert Canterbury were present on the Campus. Suddenly and without warning

and without cause or justification, National Guard troops fired live ammunition at a large group of students and people, intentionally, willfully, wantonly and maliciously disregarding the lives and safety of students, spectators, passers-by, and other individuals lawfully on the campus, including Allison Krause, who was wounded by a bullet fired by a weapon of a national guardsman, from which wound she eventually died, thereby depriving her of her life without Due Process of Law, and in violation of her right to Equal Protection of the Laws. At no time did defendant Robert Canterbury take any action whatsoever to prevent his troops from so conducting themselves, and such failure under the circumstances then and there existing was an intentional act committed in willful, wanton, reckless and callous disregard and indifference for the lives of civilians present on the Campus of Kent State University, including plaintiff's decedent, Allison Krause.

12. All acts hereinmentioned were done individually and in conspiracy by these defendants and by other unknown persons with the specific intent of depriving plaintiff and plaintiff's decedent of their rights to Due Process of Law and to Equal Protection of the Laws, and these acts were all done by all defendants and other unknown persons under color of statutes, ordinances, regulations, customs and usages of the State of Ohio.

13. Plaintiff says that he and his family suffered great grief and distress as the result of the wrongful death of his daughter, who herself suffered conscious pain prior to her death, and that he and other beneficiaries had an interest in the life of the decedent, Allison Krause.

SECOND CAUSE OF ACTION

1. By this reference plaintiff incorporates all of the allegations of the First Cause of Action as though those allegations were fully set forth herein at this point.

2. For this Second Cause of Action, plaintiff says that he is a citizen of the State of Pennsylvania, and that defendants are all citizens of the State of Ohio, and that this Court has jurisdiction of this Second Cause of Action by virtue of the diversity of citizenship of the parties.

3. Defendants ordered troops which they knew, or in the exercise of ordinary care should have known, were equipped with guns loaded with live ammunition onto the Campus of Kent State University at a time when:

(a) Defendants knew, or in the exercise of ordinary care should have known, that there was no cause, or insufficient cause, for sending armed troops at said time into said place; and

(b) Defendants knew, or in the exercise of ordinary care should have known, that said troops were not properly trained in the correct and reasonable use of loaded weapons when in the presence of civilians not similarly armed; and

(c) Defendants knew, or in the exercise of ordinary care should have known, that the presence of such troops, so improperly trained, and so armed, under the circumstances created an unreasonable danger on the Campus of Kent State University, creating an imminent risk of injury and death to all students then on the Campus, including plaintiff's decedent, Allison Krause.

4. The ordering of these improperly trained and armed troops onto the Kent State Campus on the part of these defendants was negligent and careless, and the negligence and carelessness of these defendants as hereinabove alleged directly and proximately caused the wrongful death of plaintiff's decedent, Allison Krause.

WHEREFORE, plaintiff prays for judgment on both Causes of Action against all defendants for compensatory damages in the sum of ONE MILLION DOLLARS ($1,000,000.00), together with the costs of this action.

WHEREFORE, plaintiff prays for judgment on both Causes of Action against all defendants for punitive damages in the sum of FIVE MILLION DOLLARS ($5,000,000.00), together with the costs of this action.

/s/ STEVEN A. SINDELL
SINDELL, SINDELL, BOURNE, MARKUS STERN & SPERO
1400 Leader Building
Cleveland, Ohio 44114
781-8700

## MOTION TO DISMISS AND ATTACHMENTS IN KRAUSE CASE

(Filed August 17, 1970)

Civil Action No. C-70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

### MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION FOR CHANGE OF VENUE

1. Now come the defendants Major General Sylvester Del Corso, Adjutant General of the State of Ohio, and Brigadier General Robert Canterbury, Assistant Adjutant General of the State of Ohio, and respectfully move this Court, pursuant to Rule 12 (b) (1) of the Federal Rules of Civil Procedure, for an order dismissing both causes of action in the amended complaint herein because the Court lacks jurisdiction of the subject matter:

(A) These defendants are sued in their representative capacity as military officers and agents of the sovereign state of Ohio. Because it appears from the body of the amended complaint that the matter involved is one in which the State of Ohio is primarily concerned and will be affected by any judgment rendered herein, the action is one essentially against the State of Ohio which has not consented to be sued by waiving its constitutional right to sovereign immunity.

(B) Aside from Ohio being the real party in interest and therefore immune to civil suit, defendants Adjutant General Del Corso and Brigadier General Canterbury are themselves immune to civil suit by the statutory law of Ohio which this Court is obligated to follow.

2. Defendants Adjutant General Del Corso and Brigadier General Canterbury further move this Court, pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure, for an order dismissing plaintiff's second cause of action in the amended complaint herein because the second cause of action fails to state a claim upon which relief can be granted.

3. In the alternative, defendants Adjutant General Del Corso and Brigadier General Canterbury move this Court to transfer this action to the United States District Court for the Southern District of Ohio pursuant to Title 28, U.S.C.A. Section 1404 (a), for the convenience of the parties, the welfare of the state, and in the interest of justice. As more clearly appears in the affidavits of Adjutant General Del Corso and Brigadier General Canterbury, hereto attached and marked as Exhibits A and B respectively, the injury set forth in the amended complaint herein arose in greatest portion in the southern judicial district of Ohio; defendants are officials of the State of Ohio with the welfare of this state demanding their con-

stant presence in the capital; and the vast majority of records needed for the trial of this lawsuit are found in the southern district of this state.

Respectfully submitted,

CRABBE, NEWLON, POTTS, SCHMIDT, BROWN & JONES

By /s/ CHARLES E. BROWN
*Trial Attorney*

## MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION FOR A CHANGE IN VENUE

During the evening hours of May 2, 1970, the Mayor of Kent, Ohio, Leroy M. Satrom, called the Governor's office of this state to report that violence and civil disorder existed in Kent, Ohio. Because available law enforcement was inadequate to suppress the eminent public danger threatening Kent and its citizens, Mayor Satrom requested that Governor Rhodes order the Ohio National Guard to his city. Governor Rhodes, acting in consideration of Mayor Satrom's request for aid, authorized the Adjutant General of this state:

> "to maintain peace and order in the City of Kent and on the campus of Kent State University in Portage County . . . and through him the commanding officer of any organization of said militia is . . . ordered to take action necessary for the restoration of order in the city and on the campuses aforesaid. (Executive Proclamation issued 5 May, 1970, supplementing Executive Proclamation of 29 April, 1970, marked Exhibit 3 and attached hereto).

It was from the circumstances of public danger and the responsive Executive Proclamation that plaintiff's alleged cause of action arises.

## MOTION TO DISMISS

1. A. The first part of this memorandum is submitted in support of defendants' motion to dismiss this action, pursuant to Rule 12 (b) (1) of the Federal Rules of Civil Procedure, on the ground that this Court lacks jurisdiction over the subject matter. Adjutant General Del Corso and Brigadier General Canterbury were acting in their official representative capacities as military officers and agents of the sovereign State of Ohio at the time plaintiff's alleged cause of action arose. It is defendants' position that because they are sued in their official capacities, they are immune from suit.

The first cause of action is brought by authority of Title 42, U.S.C.A. Section 1983, against Adjutant General Del Corso and Brigadier General Canterbury. Although this federal provision provides a basis for bringing such an action under certain circumstances, the statute must be read in harmony with the federal constitution's guarantees and protections. The Eleventh Amendment to the Constitution of the United States commands that the doctrine of state immunity be part of the American jurisprudence saying:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state. . . . (Amendment XI U.S. Constitution.)

Hence, Congress is without power to enlarge the jurisdiction of the federal district courts to include suits against

the sovereign states; Title 42, U.S.C.A. Section 1983, cannot be read to this end.

A reading of the statute itself and the decisions interpreting it make clear that Section 1983 is not in derogation of the Eleventh Amendment nor the common-law immunity of sovereign states. It was exactly such a suit as this against a sovereign state through its officials as nominal parties that Congress tried to prevent when this federal statute was drafted. The language of the statute confirms this conclusion when it specifically states "every *person* . . . shall be liable". (Emphasis added.) It would not only be unconstitutional for this Court to permit plaintiff to sue the State of Ohio under the guise of naming these defendants as nominal parties but it would clearly violate the expressed intent of Congress. This statute has been similarly interpreted in the case of *Fowler v. United States,* (C. D. Cal. 1966) 258 F. Supp. 638 in which the court stated at page 646:

> "Turning now to the State of California, it is clear that the word 'persons' as used in the Civil Rights Acts (42 U.S.C.; 1983) does not include a state or its governmental subdivisions, acting in its *sovereign,* as distinguished from its proprietary capacity. *Hewitt v. City of Jacksonville,* 188 F. 2d 423, 424 (C.A. 5th 1951), cert. den. 342 U.S. 835, 72 S. Ct. 58, 96 L.ed. 631 (1951); *Sires v. Cole,* 320 F. 2d 877, 879 (C.A. 9th 1963)."

And in headnote 16, of *Fowler v. United States,* Ibid, the state's immunity is applied equally to the state's officials:

> "Civil Rights Statutes do not afford any basis for civil actions . . . against public officers acting in their official capacities in good faith and in pursuance of federal or state law. 42 U.S.C.A. Sections 1981-1985, 1988.

The *Fowler* decision defines the policy behind the doctrine of sovereign immunity which, although expressed in terms of the federal government's immunity, is also relevant to a state's immunity from suit given the Eleventh Amendment protections. Again at page 646 the court states:

> "The reason for this rule is a simple and fundamental matter of policy which, in the words of Judge Learned Hand in *Greogoire v. Biddle*, 177 F. 2d 579, 580-581 (C.A. 2d 1949) is to permit public officers to act unflinchingly in the discharge of their duties without a constant dread of retaliation.
>
> [17, 18] But even more important than these considerations is the fact that, with respect to defendant United States of America, the well-established principle of law summed up in the phrase, 'doctrine of sovereign immunity', stands as an unalterable and impregnable barrier between plaintiff and any injunctive relief against this defendant.
>
> Nor can the plaintiff evade the doctrine of sovereign immunity by claiming that this suit is one against officers of the United States, since a suit against such officers is, in effect, a suit against the United States itself and must fail because of the government's immunity from suit. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688, 69 S.Ct. 1457, 93 L.Ed. 1628 (1948); *Maline v. Bowdoin*, 369 U.S. 643, 647, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962); 10 L.Ed. 2d 15 (1963).
>
> Stated another way, the sovereign cannot be sued without its consent and any possible waiver of this immunity, as for instance in the Federal Tort Claims Act (28 U.S.C. Sections 1346(b), 2671-2680), must

be strictly construed. *United States v. Sherwood*, 312 U.S. 584, 589, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); *Wallace v. United States*, 142 F.2d 240, 243 (C.A. 2d 1944), cert. den. 323 U.S. 712, 65 S.Ct. 37, 89 L. Ed. 573 (1944); *Candell v. United States*, 189 F. 2d 442, 444 (C.A. 10th, 1951.)"

As expressed in the *Fowler* case, agents and representatives of a sovereign state are equally immune to civil liability with Section 1983 being no exception to this Rule. The historial immunity of state officials relative to Section 1983 is considered in the case of *Kenney v. Killian*, (W. D. Mich. 1955) 133 F. Supp. 571 at page 578 where the court concludes:

"This statute was originally enacted by the Congress in the turbulent days of reconstruction following the Civil War. Since then it has remained in a rather dormant state and has not been substantially revised or modified. It is only in comparatively recent years that resourceful plaintiffs and lawyers have invoked this statute as a basis for civil actions for money damages against public officials acting in the course of their official duties. Although the statute remains on the books and in force, it certainly seems clear that the Congress by its enactment in the reconstruction period never intended that it should be used as a basis for civil actions for damages against judges, prosecuting attorneys, sheriffs, prison wardens, and other public officers acting in their official capacities, in good faith and in pursuance of State law. See *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L.Ed. 1019; *Francis v. Lyman*, 1 Cir., 216 F.2d 583; *Ginsburg v. Stern*, D.C., 125 F.Supp. 596, affirmed 3 Cir., 225 F.2d 245, by the Court of Appeals for the Third Circuit."

The case of *Dunn v. Estes*, (D.C. Mass. 1953) 117 F. Supp. 146 further affirms that the use of the word "person" in Section 1938 did not destroy the immunity of public officials. Headnote 2 of this case states:

> "Civil Rights Act, nothwithstanding the use of the phrase 'every person' does not destroy immunity of public officials from civil liability for consequences of performance of their official duties. 42 U.S.C.A. Section 1983, 1965(3)."

Further, in the *Dunn* decision at page 148 it is stated:

> . . . if the act complained of was done within the scope of the officer's duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, or because of an erroneous construction and application of the law.

It is clear that Adjutant General Del Corso and Brigadier General Canterbury are agents of the sovereign state of Ohio and, therefore, a suit brought against these agents of Ohio is, in reality, a suit against their sovereign principal. The agency relationship between Ohio and these defendants in the situation at bar is beyond doubt.

Article IX of the Ohio Constitution provides for the militia and further provides in Article III, Section 10, that this state's governor shall be commander-in-chief of the military forces of the State. In accordance with Article IX, Section 3, the governor is to appoint the Adjutant General of the military force and pursuant to Section 5919.02 O.R.C., Brigadier General Canterbury is likewise an agent of the state appointed through its commander-in-chief. At the time plaintiff's alleged cause of action

arose, not only were defendants agents of the sovereign state, but had been called to active duty by the governor of Ohio under authority of Article IX, Section 4, of the Ohio Constitution and Section 5923.231 of the Ohio Revised Code. The fact of agency is affirmed by plaintiff's amended complaint.

Justice Harlan stated in *Maryland, et al. v. United States,* 381 U.S. 41, 85 S.Ct. 1293, 14 L.Ed. 2d 205 (1965) at 14 L.Ed. 2d page 210 with reference to the relationship between national guard personnel and the state exercising control over them:

> "Their appointment by state authorities and the immediate control exercised over them by the states make it apparent that military members of the Guard are employees of the States, and so the courts of appeal have uniformly held."

It is apparent from a reading of the amended complaint that plaintiff is not suing these defendants in their individual capacity but rather is suing them as state officials, acting as representatives of Ohio at the time the injury occurred pursuant to their duties on behalf of the state under executive order. (See Exhibit 3).

The fact that the State of Ohio is a real and primary party defendant in this action is substantiated by guidelines laid down by the Supreme Court of the United States in the case of *Ford Motor Co. v. Treasury Department,* 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1944). Although this case was not brought under Section 1983, Justice Reed's opinion discusses the realities of sovereign immunity. It is there written in the headnotes:

> "Where an action is authorized by statute against a state officer in his official capacity and constituting an action against the State, the Eleventh Amend-

ment operates to bar suit in the Federal Courts except insofar as the state waives state immunity from suit.

"The Eleventh Amendment, which provides that the judicial powers of the United States shall not be construed to extend to any suit against a state, denies to the Federal Courts authority to entertain a suit brought by private parties against a state without its consent.

"The nature of a suit against a state officer as one against a state within the operation of the Eleventh Amendment is to be determined by its *essential nature and effect.*" (Emphasis added.)

There is little doubt that by the *nature* of this action and its possible *effects* the State of Ohio is the real and the primary party in interest. The litigation would ultimately determine and interpret the constitutional and statutory rights, obligations, and powers of this sovereign when confronted by a future riot situation. Although Adjutant General Del Corso and Brigadier General Canterbury are today the officials in command, the possible outcome and effect of the litigation would be much broader and more far-reaching than the interests of these nominal defendants. The interests of this sovereign state are primarily involved subjecting the State of Ohio to a lawsuit which is violative of her Eleventh Amendment rights.

Although a sovereign may waive immunity and consent to being sued, it is a matter of the state's own constitutional and/or statutory procedure as to how and when such a waiver is to be accomplished. Unless this state procedure is followed, a waiver of the state's immunity cannot be claimed.

In order to decide the jurisdictional question posed by defendants' motion to dismiss, it needs be determined if the sovereign state of Ohio has consented to the suit or waived its immunity. As to whether there has been such a waiver or consent to suit, the law of the sovereign holding the privilege must be considered.

> Section 16, Article I, Ohio Constitution provides: "Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

This constitutional provision is interpreted in the Ohio Supreme Court case of *Randabaugh v. State,* 96 Ohio St. 513, 118 N.E. 102 (1916) holding *inter alia* that:

> "The provision of the Ohio Constitution, Article I, Section 16 . . . is not self-executing; and statutory authority is required as a prerequisite to the bringing of suit against the state."

This rule has been consistently followed in subsequent Ohio cases. See: *State ex rel. Williams v. Glander,* 143 Ohio St. 188, 74 NE 2d 32 (1947); *Wolf v. Ohio State University Hospital,* 170 Ohio St. 49, 162 NE 2d 475 (1959).

The United States Supreme Court case of *Palmer v. Ohio,* 248 U.S. 32, 64 L.Ed. 108, 39 S.Ct. 16 (1918) is determinative. It is there stated in the headnotes:

> 1. The right of individuals to sue a state in either a Federal or State court cannot be derived from the constitution or laws of the United States, but only from the consent of the State.
>
> 2. Whether a state has given by a constitutional amendment the consent necessary to permit suit to be brought against it is a question of local state law as to which the decision of the highest state court is con-

trolling with the Federal Supreme Court where no Federal question is invoked.

3. Persons suing a state for damages are not deprived of their property without compensation, in violation of the 5th Amendment of the Federal Constitution, by a decision of the court that the state had not consented to be sued.

Therefore, the rule announced by the Supreme Court of Ohio in *Randabaugh* and consistently followed in Ohio is now controlling in this federal forum. The sovereign state of Ohio has not waived its immunity and has not consented to be sued in this instance.

1. B. Aside from Ohio's sovereign protection of immunity from civil suit based upon Eleventh Amendment guarantees, Adjutant General Del Corso and Brigadier General Canterbury are themselves immune to civil suit in a federal tort action by Section 2923.55 of the Ohio Revised Code.

"Section 2923.55 Death or injury of rioter by use of necessary force.

Police officers, special police officers, sheriffs, deputy sheriffs, highway patrolmen, other law enforcement officers, members of the armed forces of the United States, and firemen, when engaged in suppressing a riot or in dispersing or apprehending rioters and after an order to desist and disperse has been issued pursuant to Section 2923.51 of the Revised Code, are guiltless for killing, maiming, or injuring a rioter as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend rioters. This section does not relieve a member of the organized militia or armed forces of the United States from prosecution by court-martial for a military offense."

That Section 1983, Title 42, U.S.C.A. is to be read in the context of tort liability is certain. Headnote 9 preceding the decision in the case of *Daly v. Pederson,* (D.C. Minn. 1967), 278 F.Supp. 88 reads:

> "Civil Rights Act is to be read in the context of tort liability." 42 U.S.C.A. Section 1981-1986."

And on page 94 of this opinion, the court states this with authority for the truism:

> ". . . it is true that the Civil Rights Act is to be read in the context of tort liability, see *Monroe v. Pape,* 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961) . . ."

Our 6th Circuit Court of Appeals in the case of *Corbean v. Xenia City Board of Education,* (C.A. Ohio 1966), 366 F.2d 480, cert. den. 87 S.Ct. 776, 385 U.S. 1041, 17 L.Ed. 2d 685 recently followed a long line of precedents stating the rule:

> "We follow Ohio law in this tort action unless such Ohio law offends federal law or the United States Constitution *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Williams v. Kaiser,* 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 3981 (1945); *Madden v. Commonwealth of Kentucky,* 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1949)."

The *Corbean* case's jurisdiction in federal court was based upon Title 28, 1343 U.S.C.A. as is plaintiff's first cause of action. Plaintiff's second cause of action herein based on diversity jurisdiction would similarly apply Ohio's substantive law. (*Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). Hence, because Section 2923.55 of the Ohio Revised Code is part of this states substantive tort law, under the *Corbean* doctrine, this federal court must apply this Ohio immunity statute

in this situation thereby insulating Adjutant General Del Corso and Brigadier General Canterbury from suit.

For this reason and because Ohio is itself the real party in interest in this lawsuit and is protected by the Eleventh Amendment of the United States Constitution, it is respectfully submitted this motion to dismiss be sustained.

2. Defendants Adjutant General Del Corso and Brigadier General Canterbury move to dismiss plaintiff's second cause of action found in the amended complaint for the further reason that this second cause of action fails to state a claim upon which relief can be granted. This motion is made pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure.

This court's jurisdiction over plaintiff's second cause of action is based upon the parties' diversity of citizenship (Title 28, U.S.C.A. Section 1332). It is well established that federal courts exercising diversity jurisdiction follow the substantive law of the forum state. (Title 28, U.S.C.A. Section 1652; *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)).

Section 5923.37 of the Ohio Revised Code provides immunity for defendants Del Corso and Canterbury in the situation at bar except in cases of willful or wanton misconduct. This statute, part of this forum state's substantive law, provides:

> "When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

There is no question but that defendants Del Corso and Canterbury were ordered to duty by the Governor of this state by authority of his position as commander-in-chief of the Ohio National Guard. (Supplemental Executive Proclamation of 5 May, 1970; Exhibit 3 attached hereto). Further, there is no allegation in plaintiff's second cause of action that defendants Del Corso and Canterbury acted with the willful or wanton misconduct necessary to negate their statutory immunity which this court must respect.

Although plaintiff's second cause of action does incorporate by reference the allegations of the first cause of action, plaintiff continues in Sections a, b and c of paragraph 3 to specifically allege only that defendants failed to exercise "ordinary care". If the plaintiff's second cause of action is interpreted as having incorporated the allegation of willful misconduct found in the first cause of action, the second cause of action must be said to be self-contradicting.

That such a contradiction would be the reality of plaintiff's second cause of action if the willful misconduct allegations of the first cause of action is read into the second cause of action is shown by the case of *Anderson v. Commissioner of Internal Revenue,* (C.C.A. 10 1936) 81 F.2d 457 at page 460. It is there written:

> "This finding of negligence negatives the contention that the damage was occasioned by the willful . . . act of Anderson. Negligence and willfulness are mutually exclusive terms. . . . 'Negligence and willfulness are the opposites of each other. They indicate radically different mental states.' *Standard Marine Ins. Co. v. Nome Beach L. & T. Co.* (C.C.A. 9) 133 F 636.

Although it is true that under the Federal Rules of Civil Procedure plaintiff may set up inconsistent *separate* claims, each claim itself must contain consistent allegations. The case of *Steiner v. Twentieth Century-Fox Film Corporation* (S.D. Calif. 1953) 140 F.Supp. 906 affirms this rule of pleading in headnote 3 where it is stated:

> "Inconsistent allegations can be made in separate claims or defenses but not in the same cause of action. Fed. Rules Civ. Proc. Rule 8(a)(2), 28 U.S.C.A."

Because Rule 8(f) of the Federal Rules of Civil Procedure demands that all pleadings be "construed to do substantial justice" paragraph 1 of plaintiff's second cause of action must be interpreted as *not* incorporating the inconsistent allegation of willful misconduct on the part of defendants Del Corso and Canterbury. To interpret this incorporation paragraph of plaintiff's second cause of action differently would result in the inconsistent and mutually exclusive allegations of ordinary negligence and willful misconduct in the same cause of action. Since such allegations are mutually exclusive, each would negate the other causing the second cause of action to fail absolutely. Therefore, interpreting plaintiff's second cause of action so as to accomplish substantial justice, this claim must be said to allege only ordinary negligence against defendants Del Corso and Canterbury.

For the above reason, it is now submitted that plaintiff's second cause of action is a claim upon which relief cannot be granted and that defendants' motion to dismiss should be sustained.

IN THE ALTERNATIVE, MOTION FOR CHANGE OF VENUE.

3. The third part of this memorandum is in support of defendants' alternative motion for a change of venue. The case at bar is an action brought by a resident of Pennsylvania against three officials of the State of Ohio in a judicial district where, at most, only part of plaintiff's claim arose. The claim is not made against those who acted on the Kent State campus by "pulling the triggers". Rather, the claim here is brought against the state officials who acted to create the situation from which the shooting occurred. The decisions and orders of the state officials providing the substance of plaintiff's claim arose in Columbus, Ohio. (Exhibit 1, paragraphs 3 and 4; Exhibit 2, paragraphs 4 and 5, attached hereto). It is, therefore, the Southern District Court of Ohio which has the compelling contact with the claim's genesis and must be considered for purposes of change in venue the judicial district where the claim arose.

Because a plaintiff's choice of forum is not an absolute and uncontrolled privilege (*Wright v. American Flyer's Airline Corp.*, (D.C.S.C. 1967), 263 F. Supp. 865), the plaintiff's selection is in no way determinative and is of little value when the selected forum is not the district in which plaintiff or defendant resides and when plaintiff's alleged claim arose in greatest part in another judicial district. (*Glenn v. Trans World Airlines, Inc.*, (D.C.N.Y. 1962) 210 F. Supp., 31.) The only contact of this lawsuit to the Northern District Court of Ohio is that the result of defendant's actions manifested themselves there.

Further, all of the defendants in this lawsuit are state officials and have duties to the State of Ohio which neces-

sarily demand their presence in the capital. (Exhibit 1, paragraphs 5 and 6; Exhibit 2, paragraphs 6 and 7 attached hereto). Because the convenience of state officials as witnesses is to be given a higher priority than the convenience of expert witnesses in determining the propriety of a motion for change of venue (*Glickenhaus v. Lytton Financial Corp.* (D.C. Del. 1962), 205 F. Supp. 102), it must certainly follow that when *parties* are state officials and their presence is sure to be necessary for many days (as compared to a witness who testifies and leaves) the convenience and efficacy of their public duties must be respected.

It is important to note that the State of Ohio demands that suits brought against state officials be brought in the county of the capital; the theory being that such causes of action arise at the capital notwithstanding the ultimate injury results in another county. The purpose is, of course, to permit state officials to remain in the capital where they can most efficiently perform their duties to the state. Section 2307.35 of the Ohio Revised Code demands:

> "Actions for the following causes must be brought in the county where the cause of action or part thereof arose:
>
> (B) Against a public officer, for an act done by him in virtue or under color of his office, or for neglect of his official duty."

The Ohio Supreme Court case of *Meeker v. Scudder*, 108 O.S. 423, 1 O.L.A. 867, 140 N.E. 627 interpreted G.C.; 11271 (now Section 2307.35, O.R.C. supra) stating in headnote 4:

> "Under Section 11271, General Code, actions against . . . public officers having their official places of business in Franklin County, and in no other county, can be instituted only in Franklin County."

Therefore, even though federal venue provisions are controlling of this matter, since under the federal venue provisions this cause of action is properly brought in either the northern or southern districts of Ohio, the policy of the state should control this motion for a change in venue which rests in the discretionary powers of this court.

Another compelling factor for transferring this lawsuit to the southern district court is that the vast majority of records which will be very relevant to this lawsuit are located in Columbus. (Exhibit 1, paragraph 7; Exhibit 2, paragraph 8, attached hereto). There is no doubt but that these records are more conveniently located to the southern district court than they are to the district court sitting in Cleveland, Ohio.

When all relevant factors are considered, we find that the only element favoring the litigation of this suit in the northern district court is that the results of plaintiff's claim were realized within this court's boundaries. When this single element is balanced against the situs of defendants' alleged wrongful actions, the convenience of state officials in efficiently performing their public duties, and the availability of relevant public records to the respective forums, the balancing determination is clear. A motion for change of venue should be sustained.

Respectfully submitted,

CRABBE, NEWLON, POTTS, SCHMIDT, BROWN & JONES
42 East Gay Street
Columbus, Ohio 43215
Telephone: 228-5511
By /s/ CHARLES E. BROWN
*Trial Attorney*

(Certificate of Service omitted in printing)

## EXHIBIT 1

### AFFIDAVIT OF SYLVESTER DEL CORSO

STATE OF OHIO,
COUNTY OF FRANKLIN, SS:

Adjutant General Sylvester Del Corso, being duly sworn, deposes and says:

1. I am one of the three named defendants in the above captioned lawsuit.

2. I am a resident of Franklin County, Ohio.

3. All of the orders and decisions made by me in connection with sending the Ohio National Guard onto the Kent State Campus were made in the city of Columbus, Ohio, located in the Southern District Court of Ohio's jurisdiction.

4. At the time plaintiff's alleged cause of action arose, I was in Columbus, Ohio, and not on the Kent State Campus.

5. My obligations and duties to the State of Ohio as Adjutant General of the Ohio National Guard demand my constant presence in this State's capital where I maintain my office and perform my daily duties.

6. If I were to be kept away from my office in Columbus, Ohio, for any period of time, it would be impossible for me to adequately perform my duties on behalf of the State of Ohio as its Adjutant General.

7. It appears from the Amended Complaint that a great many records, files, and papers of the Ohio National Guard are relevant and necessary to the final adjudica-

tion of this lawsuit. All of these records, files, and papers are located in Columbus, Ohio.

/s/ SYLVESTER DEL CORSO
Adjutant General Sylvester Del Corso

(Jurat omitted in printing)

EXHIBIT 2

AFFIDAVIT OF ROBERT CANTERBURY

STATE OF OHIO
COUNTY OF FRANKLIN, SS:

Brigadier General Robert Canterbury, being duly sworn, deposes and says:

1. I am one of the three named defendants in the above captioned lawsuit.

2. I am a resident of Franklin County, Ohio.

3. I am also Assistant Adjutant General of the Ohio National Guard.

4. Although I was on the Kent State Campus when plaintiff's alleged cause of action arose, I made no decision nor gave any orders which caused any weapons to be fired at the deceased Allison Krause.

5. The decisions to move the Ohio National Guard troops onto the Kent State Campus were made in Columbus, Ohio.

6. My obligations and duties to the State of Ohio as Assistant Adjutant General of the Ohio National Guard demand my constant presence in this State's capital where I maintain my office and perform my daily duties.

7. If I were to be kept away from my office in Columbus, Ohio, for any period of time, it would be impossible for me to adequately perform my duties on behalf of the State of Ohio as Assistant Adjutant General of the Ohio National Guard.

8. It appears from the Amended Complaint that a great many records, files, and papers of the Ohio National Guard are relevant and necessary to the final adjudication of this lawsuit. All of these records, files and papers are located in Columbus, Ohio.

/s/ ROBERT H. CANTERBURY
Assistant Adjutant General
And Brigadier General
Robert Canterbury

(Jurat omitted in printing)

EXHIBIT 3

State of Ohio
EXECUTIVE DEPARTMENT
Office of the Governor
Columbus

PROCLAMATION

WHEREAS, in northeastern Ohio, particularly in the counties of Cuyahoga, Mahoning, Summit and Lorain, and in other parts of Ohio, in particular Richland, Butler and Hamilton Counties, there exist unlawful assemblies and roving bodies of men acting with intent to commit felony and to do violence to person or property in disregard of the laws of the State of Ohio and the United States of America; and

WHEREAS, said unlawful assemblies and bodies of men have by acts of intimidation and threats of violence put law-abiding citizens in fear of pursuing their normal vocations in the transportation industry; and

WHEREAS, local government officials, including sheriffs and their deputies and municipal police departments, are unable with their own forces to bring about a cessation of violence and reduce the believability of threats of violence; and

WHEREAS, troops of the Ohio National Guard, in coordination with the Ohio State Highway Patrol and local peace officers, can bring about a restoration of confidence in the ability of citizens to move freely in the conduct of their business over the streets and highways of the State; and

WHEREAS, the Mayors of many Ohio cities, after taking counsel with each other, have urgently requested that the Governor make available the troops of the Ohio National Guard to assist in maintaining order and in restoring freedom of transportation movement,

NOW, THEREFORE, I, JAMES A. RHODES, Governor and commander-in-chief of the militia of the State of Ohio, do hereby order into active service such personnel and units of the militia as may be designated by the Adjutant General to maintain peace and order and to protect life and property throughout the State of Ohio; and said Adjutant General, and through him the commanding officer of any organization of such militia, is authorized and ordered to take action necessary for the restoration of order throughout the State of Ohio. The military forces involved will act in aid of the civil authorities and shall consult with them to the extent necessary to determine the objects to be accomplished, leaving the procedure of execution to

the discretion of the commanding military officer designated by the Adjutant General.

The Adjutant General shall provide all transportation, services, and supplies necessary for the militia; and all statutory provisions requiring advertisement for bids in relation to their procurement are hereby suspended.

I command all persons engaged in riotous and unlawful proceedings to cease and desist from such activities.

The active military duty herein ordered is hereby designated as service in a time of public danger.

This proclamation shall continue in force until revoked.

(SEAL OF OHIO)

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, this 29th day of April, in the year of our Lord, one thousand nine hundred and seventy.

/S/ James A. Rhodes
Governor

ATTEST:
Ted W. Brown
Secretary of State

## EXHIBIT 4

State of Ohio
EXECUTIVE DEPARTMENT
Office of the Governor
Columbus

### PROCLAMATION

WHEREAS, on April 29, 1970, the Governor of Ohio as commander-in-chief issued verbal orders to the Adjutant General of Ohio directing him to call-up such units of the Ohio National Guard as in his judgment might be necessary or desirable to meet disorders and threatened disorders relating to wildcat strikes in the truck transportation industry, and to meet disorders or threatened disorders on campuses of Ohio State University in Franklin County, and campuses of other state-assisted universities; and

WHEREAS, pursuant to Section 5923.231 of the Ohio Revised Code, the Governor of Ohio thereafter on April 29, 1970 issued his Proclamation ordering into active service such personnel and units of the militia as the Adjutant General might designate "to maintain peace and order and to protect life and property throughout the State of Ohio;" and

WHEREAS, pursuant to the verbal orders aforementioned, the Adjutant General of Ohio called to active service units of the Ohio National Guard and assigned them variously to service in the City of Kent and on the campus of Kent State University in Portage County, and on the campus of Ohio State University in Franklin County. In addition to divers specific assignments related to restoration of order in the truck transportation industry; and

WHEREAS, it is desirable to make a written record, both events and the derivation of authority exercised by personnel and units of the Ohio National Guard in Portage County and Franklin County.

NOW, THEREFORE, I, JAMES A. RHODES, Governor and commander-in-chief of the militia of the State of Ohio, do hereby supplement my Proclamation of April 29, 1970, by specifying that personnel and units of the militia as may or may have been designated by the Adjutant General to maintain peace and order in the City of Kent and on the campus of Kent State University in Portage County, and on the campus of Ohio State University in Franklin County, are included in the call to active service hereinbefore referred to; and said Adjutant General and through him the commanding officer of any organization of said militia is and was ordered to take action necessary for the restoration of order in the city and on the campuses aforesaid. The military forces involved are and were ordered to act in aid of the civil authorities, and the Adjutant General was directed to consult with them to the extent necessary to determine the object to be accomplished, leaving the procedure of execution to the discretion of the commanding military officer designated by the Adjutant General.

The active military duty herein further delineated is again designated as service in time of public danger.

This Proclamation shall continue in force until revoked with my Proclamation of April 29, 1970.

(SEAL OF OHIO)

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at

Columbus, this 5th day of May, in the year of our Lord, one thousand nine hundred and seventy.

/S/ James A. Rhodes
Governor

ATTEST:
Ted W. Brown
Secretary of State

## MOTION TO DISMISS IN KRAUSE CASE

(Filed August 17, 1970)

Civil Action No. C-70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

### MOTION TO DISMISS

1. Now comes defendant James Rhodes, Governor of the State of Ohio, and, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure respectfully moves this Court for an order dismissing both causes of action in the Amended Complaint herein for the reason that the Court lacks jurisdiction of the subject matter.

2. Defendant James Rhodes, Governor of the State of Ohio, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, further hereby moves this Court for an order dismissing plaintiff's second cause of action in

the Amended Complaint herein filed for the reason that said second cause of action fails to state a claim upon which relief can be granted.

Respectfully submitted,

/s/ R. Brooke Alloway
*Attorney for Defendant James Rhodes, Governor of the State of Ohio,*
17 South High Street
Columbus, Ohio.

## MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

3. At the outset, it is apparent that defendant Rhodes is sued in his capacity as Governor of the State of Ohio, and in that capacity, he is clothed with the immunity of the sovereign, the action being essentially against the State of Ohio, which has not in any manner consented to be sued by waiving its constitutional right to sovereign immunity. Under Article III, Section 10, Constitution of Ohio, the Governor of the State of Ohio is the Commander-In-Chief of the military and naval forces of the State, except when they shall be called into the service of the United States. National Guard units are correlated and recognized under Title 32, Section 101, et seq., United States Code. The composition and organization of the Ohio National Guard is governed under the provisions of Chapter 5919, Revised Code of Ohio. In the case of *Klaussen vs. Purcell*, 18 Ohio nisi prius (new series) 91, 27 O.D. 42, it has been held that the National Guard, which is the modern designation of the organized, equipped and disciplined portion of the militia, is recog-

nized by the Federal and State constitutions and statutes as a necessary arm of the government, and is a constitutional force.

4. It is clear from the allegations of the Amended Complaint that no claim is made that defendant Governor James Rhodes, himself, directly and proximately caused the death of plaintiff's decedent. It is further clear that, if defendant Rhodes has any culpability at all, it must be on the basis of his single act in calling the Ohio National Guard to maintain order on the campus of Kent State University on and about May 4, 1970. The duty of the Governor with respect to the National Guard, which is a part of the organized militia of the State of Ohio (Section 5923.01, Revised Code) is expressed in Section 5923.21, as follows:

> "The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia."

and further, in Section 5923.22, which reads as follows:

> "When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.
>
> "No officer or enlisted man in the organized militia, shall refuse to appear at the time and place des-

ignated when lawfully directed to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case."

5. Thus, it is seen that any act of defendant Rhodes mentioned in the Amended Complaint of plaintiff, either directly or by inference, was in pursuance of his powers and duties under the Constitution and statutes of the State of Ohio, and therefore the act of the State of Ohio itself. With respect to actions against states, it is provided in the Eleventh Amendment to the Constitution of the United States, as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

6. Thus, it is seen that Section 1983 of Title 42, United States Code, cannot be construed to confer jurisdiction on this Court to entertain a suit by this plaintiff against the State of Ohio in its sovereign capacity. Furthermore, it has been held under the Civil Rights Act, Section 1982 of Title 42, U.S. Code, that civil rights statutes do not afford a basis for civil actions against public officers acting in their official capacities in good faith and in pursuance of Federal or State statutes. See *Fowler vs. United States* (C.D. Cal. 1966) 258 Fed. Supp. 638.

7. It should be noted that nowhere in the Amended Complaint is there any allegation that defendant Rhodes did not act in good faith. And in no decisions under the Civil Rights Act has recovery been allowed against a public officer, acting under Federal or State statutes, where bad faith was not alleged and proved. Thus, in *Gregoire vs. Biddle,* 177 Fed. 2d 579, Cert. denied, 339 U.S. 949, 94

L. Ed. 1363, Judge Learned Hand analyzed the effect of sovereign immunity on the acts of public officers as follows:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retailiation. Judged as res nova, we should not hesitate to follow the path laid down in the books." 177 F. 2d at 581.

8. Further, the doctrine so announced was expressly approved by the Supreme Court of the United States in the case of *Barr vs. Matteo*, 360 U.S. 564, 571-72, (1959). Indeed, in *Barr*, the Supreme Court even indicated that allegations of malice are not sufficient to prevent the application of executive immunity. In the instant case the allegations fall far short of establishing any basis for the abrogation of executive immunity.

9. While it is not alleged that sovereign immunity has been waived by the State of Ohio, it is, perhaps, appropriate to point out that such immunity has not been waived. Section 16, Article I, Constitution of Ohio provides:

> "Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

10. This provision has been held repeatedly not to be self-executing and to require specific authority in specific situations. See *Raudabaugh vs. State*, 96 Ohio St. 513 (1917). In the same opinion, the Supreme Court of Ohio cited the case of *Palmer vs. State of Ohio*, which was subsequently affirmed by the Supreme Court of the United States in *Palmer vs. Ohio*, 248 U.S. 32, 64 L. Ed. 108 (1918).

11. The public policy requiring the rule herein urged is clear. Government can function only by uninhibited, fearless and honest exercise of the best judgment of its executives and administrators. If a Governor is to be subjected to civil liability for the far-flung and unpredictable consequences of his act in moving to avoid or suppress riotous conduct, the effect on government can only be chaotic.

12. Defendant Rhodes further moves to dismiss the second cause of action of plaintiff stated in the Amended

Complaint for the reason that this second cause of action fails to state a claim upon which relief can be granted.

13. Irrespective of the position of defendant Rhodes in the instant case as covered by sovereign immunity, the second cause of action fails to state a ground for relief, by reason of the fact that there is, in actuality, no allegation with respect to defendant Governor Rhodes that he did other than what he was authorized to do under the statutes of the State of Ohio, implementing his constitutional power as commander in chief of the State militia. Further, it is clear from the allegations of the Complaint that defendant Governor Rhodes in no way had any direct contact with the implementation of the instrument which caused the death of plaintiff's decedent; therefore, if he were to have liability at all, it must be on the basis of the doctrine of respondeat superior. Again, there is no allegation of any act in bad faith on the part of anyone. In these circumstances, it is pertinent to give regard to the provisions of Section 5923.37 of the Revised Code of Ohio, which provides immunity for members of the organized militia under the following circumstances:

> "When a member of the organized militia is ordered to do duty by State authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of wilful or wanton misconduct."

14. In the circumstances alleged in this action, it is inconceivable that this defendant can be held culpable for an act from which the actors themselves are held exonerated.

15. It is, therefore, respectfully submitted that the within motion should be sustained in its entirety, and the complaint of plaintiff as against defendant Governor James Rhodes should be dismissed and he be permitted to go hence with his costs.

/s/ R. Brooke Alloway
*Attorney for Defendant Governor James Rhodes*

(Certificate of service omitted in printing)

## MEMORANDUM OF PLAINTIFF IN KRAUSE CASE

(Filed January 18, 1971)

Civil Action No. C70,544

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Eastern Division

(Title omitted in printing)

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## MEMORANDUM OF LAW ON BEHALF OF PLAINTIFF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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### INTRODUCTION

The subject matter of this action arises out of one of the gravest tragedies in American history. Never before has this nation witnessed such a gruesome bloodletting on a college campus. Never before have members and officers of a state militia fired upon unarmed student civilians, wantonly inflicting death and injury without just

cause. It has always been the genius of our democratic system to provide a remedy for injustice. Each branch of government compliments the other, and provides adjustments for deficiencies. There are times when the effective remedy is a judicial one, or at least an effective part of the total remedy. This case calls upon the Federal Judiciary to exercise its historic function of providing a place where issues involving the most basic rights of our people can be aired. To be sure, there have been a number of investigations into what has become known as the "Kent State Massacre". Those investigations have raised disturbing problems, but they have not provided the families of these dead children the opportunity to obtain community judgment. Indeed, these families have had no real opportunity to present evidence and focus upon the viewpoint that those responsible for the death of their beloved ones shall answer and be held accountable for their actions. It is essential to note that plaintiff Arthur Krause has not brought suit against a single triggerman, not because the triggermen are blameless, but because accountability is initially critical at the highest levels of government authority, and it would seem fitting that the message of this lawsuit be perfectly clear in that regard.

Defendants are charged in the Amended Complaint with intentionally violating the constitutional rights of Allison Krause. They are charged with sending troops onto the Kent State Campus without any cause whatsoever, knowing that their presence would almost certainly and inevitably lead to injury and death. Plaintiff does not contend that this tragic killing was the result of an inadvertent or neglectful error, misjudgment or mistake. It was not the result of some kind of unwise exercise of discretion. Plaintiff is not alleging that these defendants were mistaken about the necessity of troops, or about

the dangers these troops created; such fallibility is part of the human condition, and certainly is not the subject of this kind of litigation.

Rather—and this is the crux of it—plaintiff alleges that these actions were taken by these three men—James Rhodes, Sylvester Del Corso and Robert Canterbury—with the full knowledge that there was no legitimate cause for sending these troops, with the knowledge that the presence of these troops created an imminent risk of death on the campus, and with the specific intent of wantonly violating the rights of every unarmed student on that campus.

Plaintiff asks this court: How can it ever be within any official's lawful discretion or jurisdiction to formulate and effectuate such a culpable course of misconduct?

The purpose of defendants' motion is not to deny the truth of these allegations, but rather to urge that even if they can be proven to be the truth, the plaintiff is not entitled to any relief under the law of this land.

All plaintiff Arthur Krause asks is the right to a hearing in this courthouse to establish what he has alleged before a jury. He seeks redress for alleged violence through the legal process in the best American tradition. If no redress is possible in a courtroom, what can be said in opposition to those who would seek it in the streets. It is the practical need to encourage and provide redress in court which underlies the Civil Rights Act, to provide a peaceful channel for the airing and resolution of our conflicts, no matter how fundamental they may be. Indeed, it is this kind of case—one which addresses itself to fundamentals—which the Civil Rights Act is designed to cover. This Brief is devoted to reviewing the many authorities which confirm that notion.

## THIS ACTION IS AGAINST THE DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES, AND IS, THEREFORE, NOT A SUIT AGAINST THE STATE OF OHIO

Defendants contend that the suits against them are in reality suits against the State of Ohio and, therefore, the doctrine of sovereign immunity should bar this action against them under the Civil Rights Act. Such a contention is wholly inconsistent with U.S.C. Title 42, §1983, which by its literal terms is specifically designed to create a cause of action against persons acting under color of state law for violating the federal constitutional rights of citizens. The language of the Civil Rights Act, itself, refutes defendants' contention. Certainly, Congress intended and understood that various state officers, agents and officials would fall within the ambit of persons acting under color of state law. It would hardly seem likely that Congress would pass a piece of legislation to protect citizens against violations by state officials of their federal constitutional rights, only to have that legislation effectively nullified by state sovereign immunity. It would seem anomalous to allow state officials through the doctrine of sovereign immunity to immunize themselves against a federal statute designed to protect federal rights.

It is of no assistance to defendants to inject their own characterization that they have been sued "in their representative capacities". They are sued herein as "persons" who violated plaintiff's federal constitutional rights while acting "under color" of the state law within the clear meaning of the Civil Rights Act.

Contrary to defendants' contention, the Eleventh Amendment to the United States Constitution has no application whatsoever because this is not a suit "against

one of the United States". It should be noted that such a suit was, in fact, filed in the Cuyahoga County Common Pleas Court (Case No. 884042), and in that suit, the State of Ohio properly raised the available defense of sovereign immunity. That case is now on appeal in an effort by this plaintiff to persuade the Ohio courts of the unfairness of the sovereign immunity doctrine.

Defendants cite *Fowler v. U. S.*, 258 F. Supp. 638 (1966) in support of their contention that this is an action against the state and is, therefore, barred by state sovereign immunity. *Fowler, supra,* does not stand for any such proposition. The gravaman of the case was that the plaintiff (State Chairman of the Ku Klux Klan) had failed to show a sufficiently definite and complete occurrence to constitute a violation of civil rights. The court emphasized that a mere threat or intent to violate plaintiff's civil rights did not constitute sufficient grounds for injunctive relief against the state or federal officials. Obviously, in the present case, we are hardly dealing with an incompleted threat or an uneffectuated intention. We are here dealing with the tragic finality of death, allegedly the result of specific unlawful actions taken by these defendants.

More critically, *Fowler, supra,* specifically holds that public officials who act in their official capacities in bad faith are amenable to suit under the Civil Rights Act. One need only quote from page 4 of defendant's brief:

> "Civil Rights Statutes do not afford any basis for civil actions. . . . against public officials acting in their official capacities in good faith and in pursuance of Federal or State Law 42 U.S.C.A. Sections 1981-1985, 1988". (Emphasis added).

*Fowler, supra,* cites the cases of *Hewitt v. City of Jacksonville,* 188 F2d 423 (C.A. 5th 1951), *cert. den.,* 342

U.S. 835, 72 S.Ct. 58, 96 L.Ed. 631 (1951); *Sires v. Cole*, 320 F2d 877 (C.A. 9th 1963); *Larson v. Domestic and Foreign Commerce Corp.* 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1948); *Malone v. Bowdoin*, 369 U.S. 643, 82 S. Ct. 980, 8 L.Ed. 2d 168 (1962), and *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 15 (1963). None of these cases involve allegations of intentional misconduct and bad faith, such as in this case now before the court. In fact, in *Larson, supra*, the United States Supreme Court specifically delineates the area of amenability to suit of state officials at pages 701-702:

> "The action of an official of the sovereign (be it holding, taking or otherwise affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the official as an individual only if it is not within the official's statutory powers, **or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.**" (emphasis added)

The *Larson* holding *supra*, above-quoted, is specifically reaffirmed by the United States Supreme Court in *Dugan* and *Malone, supra*. Defendants additionally cite *Kenny v. Killian*, (W.D. Mich. 1955), 133 F.Supp. 571, which specifically notes that any immunity to be applicable, requires that those officials acting in their official capacities **in good faith** (see quotation at page 5 in defendants' brief). Nor does *Ford Motor Company v. Treasury Department*, 323 U.S. 459, 89 L.Ed 389, 65 S.Ct. 347 (1944) cited by defendants, control the facts of the present case. There it was held that a suit against individuals constituting the Board of the Department of the Treasury, was a suit against the state because "where a suit is in essence one for the recovery of money from the state, the state is the real party in interest." Since the

present case is against these defendants, individually, and would not be collectible against the State of Ohio, *Ford Motor Company, supra*, is inapplicable. Such has been precisely held in Ohio in the case of *Paramount Film Distributing Corp. v. Tracy*, 176 N.E. 2d 610 (1960).

The case of *Dunn v. Estes*, (D.C. Mass. 1953) 117 F. Supp. 146, cited by defendants, does not apply to this case. Plaintiff's allegations go far beyond the kind of "mistake of fact" or "erroneous construction and application of the law" of which *Dunn*, speaks, *supra*. Moreover, defendants certainly have misapplied *Maryland, et al. v. United States*, 381 U.S. 41, 85 S.Ct. 1293, 14 L.Ed. 205 (1965), which has nothing whatsoever to do with the Civil Rights Act, or, for that matter, with sovereign immunity. In *Maryland, supra* plaintiff was contending that a National Guardsman was acting as a federal employee; however, the court held that he was acting as a state employee, thereby barring plaintiffs claim for negligence under the Federal Tort Claims Act. Clearly, the mere fact that a guardsman is acting in some sense as a "state employee", does not in and of itself totally exempt that guardsman from liability under U.S.C. Title 42, Section 1983.

Defendants have completely failed to cite, much less distinguish, numerous authorities (including several of the United States Supreme Court), pointedly refuting defendants' argument that this suit is in reality against the State of Ohio and is barred by the Eleventh Amendment or any other immunity.

One of the leading decisions of the United States Supreme Court is *Monroe v. Pape*, 365 U.S. 167, 5 L.Ed. 492 (1960). In that important decision, the plaintiff alleged a violation of his Fourteenth Amendment rights under the Civil Rights Act by municipal police officers, who allegedly, after arresting plaintiff failed to take him to a magistrate,

to allow him to call his family, to make any specific charges against him, or to obtain a required search or arrest warrant. Defendants (13 individual police officers) contended that since Illinois provided redress for this kind of alleged misconduct, the Civil Rights Act did not apply. Mr. Justice Douglas, for the majority, specifically held that the Civil Rights Act was a supplementary remedy to any available state remedies. As Mr. Justice Douglas stated at page 498:

> **"The third aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice".** (emphasis added)

In *Egan v. City of Aurora,* 365 U.S. 514 (1960), the United States Supreme Court specifically removed immunity from liability under §1983 for City Commissioners, council for the city, police chief, sheriff, Justice of the Peace, state's attorney, and others, for arresting the Mayor of Aurora during a meeting which defendants alleged had possibilities of turning into a riot.

With respect to the argument of defendants that the Eleventh Amendment bars this suit, defendants failed to cite the landmark decision by the United States Supreme Court, *Ex Parte Young,* 209 U.S. 123 (1908), a suit against the Attorney General of Minnesota to enjoin enforcement of an unconstitutional state statute. The Supreme Court rejected the argument that the suit was in reality one by a citizen against a state, thereby barred by the Eleventh Amendment. The court specifically held that "the state has no power to impart to him any immunity from responsibility to the supreme authority of the United States . . . he is stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." Similarly, in the case of *Georgia Railroad & Banking Co. v. Redwine, State Reve-*

*nue Commissioner*, 342 U.S. 299 (1952), a citizen challenged the unconstitutionality of collecting taxes that impaired the obligation of contract. In refusing immunity under the Eleventh Amendment, the United States Supreme Court held that "a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the state". Numerous authorities have followed these critical Supreme Court decisions regarding the Eleventh Amendment and state sovereign immunity as a defense under the Civil Rights Act.

In *Chapman v. California*, 17 L.Ed. 2d 705 (1967), the United States Supreme Court alluded to the essence of its previously adopted positions in *Ex Parte Young*, *Georgia Railroad & Banking Co.*, *Monroe*, and *Egan*, *supra*, in holding that the federal standard of harmless error was applicable where federal constitutional rights are at stake, at page 709:

> "With faithfulness to the constitutional union of the states, we cannot leave to the states the formulation of the authoritative laws, rules and remedies designed to protect people from infractions by states of federally guaranteed rights."

See also, the case of *Johnson v. Crumlish*, 224 F. Supp. 22 (D.C. Penn. 1963), where the court permitted suit under §1983 against the District Attorney of Philadelphia, Clerk of Quarter Sessions Court, and others, for having imprisoned the plaintiff under an illegal bench warrant.

Other authorities have held that state immunity should not apply in actions against public officials for violations of federally protected rights. See *American Federation of State, County and Municipal Employees, AFL-CIO v. Woodward*, 406 F. 2d 137 (8th Cir. 1969); *Westberry v. Fisher*, 309 F. Supp. 12 (S.D. Maine 1970); *Birnbaum v. Trussell*, 347 F. 2d 86 (2d Cir. 1965); and *Jobson*

*v. Henne*, 355 F. 2d 129 (2d Cir. 1966). In *Birnbaum, supra*, a physician brought an action under §1983 against the Commissioners of the City Department of Hospitals, for dismissal based on race; the Circuit Court pointed out that a showing that the defendants acted within the scope of their employment is not sufficient to defeat the court's jurisdiction. The court reasoned at pages 88-89, as follows:

> "It would nullify the whole purpose of the Civil Rights Statutes to permit governmental officials to resort to the doctrine of official immunity . . . to the extent that state or municipal officers, such as the defendants Trussell and Mangum violate or conspire to violate constitutional and federal rights, the Civil Rights Laws. . . . abrogate the doctrine of official immunity". (emphasis added).

In *Jobson, supra*, the Circuit Court held as follows at page 133:

> "To hold that all state officials in suits brought under §1983 enjoy an immunity similar to that they might enjoy in suits brought under state law would practically constitute a judicial repeal of the Civil Rights Act . . . the purpose of §1983, as well as the other Civil Rights provisions, is to provide a federal remedy for deprivation of federally guaranteed rights . . . to hold state officials immune from suit would very greatly frustrate the salutary purpose of this provision".

*Jobson, supra*, was a suit by an inmate of a mental institution against the officers and supervising psychiatrists at that institution. The court went on to reason that "the language and purpose of the Civil Rights Acts are inconsistent with the application of common law notions of of-

ficial immunity." Since §1983 says that acts of persons liable must be under color of law, "this test can rarely be satisfied in the case of anyone other than a state official".

See also, the case of *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117 (S.D., N.Y. 1969), where the court held at page 123:

> "We fail to perceive what interest would be served by holding Federal Courts to be powerless to enjoin state officers from acting under a statute that allegedly deprives citizens of rights protected by the Civil Rights Act or promulgating regulations that are alleged to have that result simply because some of them are robed and others have been appointed by those who are".

In *Westberry, supra*, the court reasoned as follows at page 15:

> ". . . Section 1983 is cast in terms so broad as to indicate **that governmental immunity can never be a defense in suits brought under that section**". (emphasis added)

*Peterson v. Stanczak*, 48 F.R.D. 400 (N.D., Ill. E.D. 1969), held that governmental immunity is not available to policemen, sheriffs, coroners, and even in some situations, Judges.

In *Beauregard v. Wingard*, 230 F. Supp. 167 (S.D. Cal. S.D. 1964), the court held at page 173, as follows:

> ". . . it is a familiar doctrine that such a statute [42 U.S.C. §1983] may not be set at naught where its benefits denied by State Statutes, State Common Law Rules or State Decisional Law".

In *James v. Ogilvie*, 310 F. Supp. 661 (N.D., Ill. E.D. 1970), the court held at page 633, as follows:

"Nor are these defendants immune from suit. Defendants suggest that in the absence of any allegations that they were acting other than in their official capacity as state officials, they are immune from this Civil Rights action. This argument has no merit. It is precisely because defendants committed the alleged conduct in their official capacities, that is, under color of law, that they are subject to Civil Rights suits. 42 U.S.C. 1983."

In *Cohen v. Norris*, 300 F. 2d 24 (9th Cir. 1962), the court held at page 33:

". . . no logical rule of immunity unassociated with a generally recognized common law immunity can stand as a defense in a Civil Rights Act case".

See also, *Smith v. Cremins*, 308 F. 2d 188 (1962), another 9th Circuit decision following *Cohen, supra.*

Perhaps it would do well to call upon the older authority of the United States Supreme Court in *Ex Parte Virginia*, 100 U.S. 339 (1897), a decision rendered by the United States Supreme Court after the passage of the Civil Rights Act. In that case, the United States Supreme Court held that a Judge could be criminally prosecuted under provisions of a Federal Statute, making it a crime for "any officer or other person, charged with any duty in the selection or summoning of jurors" to disqualify grand or petit jurors "on account of race, color, or previous condition of servitude." 18 Stat. part 3,336. As to the claim by this Judge of judicial immunity, the United States Supreme Court held at pages 348-349, over 70 years ago, in language which bears directly upon the exercise of official power, as follows:

"Whether the act done by him was judicial or not is to be determined by its character, and not by the

character of the agent. Whether he was a county judge or not is of no importance.

"The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy or the act of a road-master in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc.

"Is their election or appointment a judicial act?

"But if the selection of jurors could be considered in any case a judicial act, **can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the state statute? That statute gave him no authority,** when selecting jurors, from whom a panel might be drawn for a circuit court to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his direction. . ." (at pp. 348-9) (emphasis added)

Many cases exist in which it has been held that state officials were properly sued under §1983. *E.G., Kerr v. City of Chicago,* 424 F.2d 1134 (7th Cir. 1970) (police officers); *Hershel v. Dyra,* 365 F.2d 17 (7th Cir.), *cert. denied,* 385 U.S. 973 (1966) (policeman-First Amendment claim); *Whirl v. Kern,* 407 F.2d 781 (5th Cir. 1969) (sheriff-false imprisonment); *Joseph v. Rowlen,* 402 F.2d 367 (7th Cir. 1968) (police officer-false arrest); *Wright v. Mc-*

*Mann*, 387 F.2d 519 (2d Cir. 1967) (Warden of State Prison); *Sostre v. Rockerfeller*, 312 F. Supp. 863 (S.D.N.Y. 1970) (Warden and State Commissioner of Corrections); *Mansell v. Saunders*, 372 F.2d 573 (5th Cir. 1967) (county officials); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964) (Mayor); *Harkness v. Sweeney Ind. School Dist.*, 427 F.2d 319 (5th Cir. 1970) (trustees and superintendent of school district); *Delatte v. Genovese*, 273 F. Supp. 654 (E.D. La. 1967) (state coroner).

Ohio authorities understandably follow the basic trend of the United States Supreme Court in this area.

In this circuit, in the case of *Bargainer v. Michal*, 233 F. Supp. 270 (1964), plaintiff had stated a cause of action against defendants who moved to dismiss the complaint for failure to state a claim under the Civil Rights Act. Plaintiff alleged that defendant police officers physically abused plaintiff, and thereafter conspired to deprive plaintiff of his constitutional rights. In *Bargainer, supra*, the court specifically held that with respect to the activities of the officers, the Motion to Dismiss had to be denied inasmuch as the complaint did state a cause of action under §1983.

However, the court noted that the conspiracy allegations failed for lack of any allegation of a specific intent to discriminate on the part of the defendants. However, the conspiracy alleged in the instant case now before this court clearly sets forth that specific intent.

In *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio E.D. 1967), plaintiffs in a class action for declaratory relief under §1983, withstood a claim of official immunity raised by defendant Governor Rhodes in a suit to prevent the State of Ohio from entering into discriminatory contracts, stating that §1983 "is intended to allow redress against official representatives of the state who abuse their posi-

tions. It was enacted as a means for reinforcing the provisions of the Fourteenth Amendment against those who act as officials of the state, whether they act in accordance with their authority or misuse it".

Similarly, in *Steine v. Atkinson*, 690 O.App. 529, 44 N.E.2d 732, (1942), the plaintiff was a Civil Service employee, who alleged he was dismissed from office by the defendants because he was a Democrat. The defendants claimed official immunity but the court rejected this defense in holding as follows:

> "Those acts dealt with matters which they were by law required to perform. It is true a public officer may be held liable in damages for torts wholly independent of his office and purely personal, but he may also be personally charged with liability for wrongs perpetrated by him in and by virtue of his office."

The court held further in supporting its position, that an official can be amenable to suit when acting in his official capacity, by relying upon former Section 11271, General Code, (now O.R.C. Section 2307.35).

See also, the case of *New American Library of World Literature v. Allen*, 114 F.Supp. 823 (N.D. Ohio E.D. 1953). The plaintiff there brought an action for an injunction and for damages against the Chief of Police for unlawful suppression of certain of plaintiff's books. The court stated as follows:

> "Where public officers exceed their lawful powers, they no longer act as duly authorized agents of government. In such cases they act with no greater legal authority than private persons."

See also, *Leech v. Cook*, 48 O.App. 205, 10 Ops. 172, 192 N.E. 797 (1934).

Defendants seem to rely heavily upon *Corbean v. Xenia City Board of Education*, 366 F.2d 480 (C.A. Ohio 1966), *cert. den.* 385 U.S. 1014, 87 S.Ct. 776, 17 L.Ed. 2d 685. *Corbean, supra*, was a personal injury action brought by the plaintiff against the School Board of Education for negligence. It is clearly distinguishable from the present case in that the suit seeks to impose liability upon a state agency, rather than against individuals, and in that §1983 is not the basis of jurisdiction. Moreover, the allegations would appear to involve only simple negligence and clearly the allegations in the present case go well beyond that.

It would, therefore, seem upon thorough review of the authorities, that defendants may not claim any immunity, either under the Eleventh Amendment or pursuant to any fair interpretation of case law. Certainly, sovereign immunity is not at issue here, and to assert it in this case as an immunity, is totally inconsistent with the fundamental purpose of the Civil Rights Act, both Title 42, Section 1983 and Title 42, Section 1985(3), which is also a jurisdictional basis for this action insofar as conspiracy is involved, the court not being bound by any title in the caption.

## THERE ARE NO ADDITIONAL CONSIDERATIONS WHICH IMMUNIZE DEFENDANT JAMES RHODES FROM AMENABILITY TO SUIT

In addition to the various contentions raised on behalf of defendants Del Corso and Canterbury, which equally apply to defendant Rhodes, defendant Rhodes raises additional contentions which will be briefly dealt with at this point.

Defendant Rhodes contends and, indeed, provides a copy of his "Proclamations" indicating that his conduct in connection with the incident of May 4 was pursuant to powers vested in him by the Constitution and Statutes of the State of Ohio. It should be patently evident from the cases cited already, that the mere fact that defendant Rhodes was ostensibly acting in an official capacity when he intentionally violated the rights of plaintiff, creates no immunity under the Civil Rights Act. Nor do the "Proclamations" which are attached as exhibits in any way create an automatic immunity for the Governor when it is alleged in the Amended Complaint that his actions, individually and in conspiracy, were designed and intended to specifically violate the rights of plaintiff, and where it is further alleged that all of his actions were taken with the full knowledge of the imminent consequences which eventually took place. It is inconceivable that the Civil Rights Act would not apply to such alleged abuse of power, particularly where one of the requirements under the Civil Rights Act is that action taken by the state official be "under color of state law." What defendant Rhodes has demonstrated is that he acted, indeed, "under color of state law". He does not demonstrate that he is immune either by virtue of some official immunity inherent in the Civil Rights Act or by virtue of any implied sovereign immunity.

It is suggested by defendant Rhodes that there is no allegation of failure on his part to act in good faith. Surely, the allegations give rise to such a clear inference, and if this is defendant Rhodes' only objection, plaintiff is certainly prepared to add these specific words to his allegations, as it would be fully consistent with everything alleged in the Amended Complaint.

See, for example, *Parine v. Levine*, 274 F. Supp. 268 (E.D. Mich. S.D. 1967), where the court held that mere

allegations of an intentional violation of another's Civil Rights made it unnecessary to consider the defense of "good faith".

In *Service Employees International Union v. City of Butler, Pa.*, 306 F. Supp. 1080 (W.D. Penna. 1969), the court found that the concept of "good faith" can only be arrived at by a factual determination.

For the reasons indicated, defendant Rhodes is similarly subject to suit, along with the other two defendants.

## THE DOCTRINE OF STATE SOVEREIGN IMMUNITY VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION

Notwithstanding plaintiff's contention that sovereign immunity is completely inapplicable in this case, plaintiff also advances the position that state sovereign immunity should be considered and held constitutionally void. As a matter of Equal Protection, what rational basis can there be for imposing a discrimination with respect to the right of recovery between that class of persons who happen to be injured or killed by "official misconduct as distinguished from that class of persons who happen to be killed by "unofficial" misconduct. Such a discriminatory doctrine is invidious, arbitrary and capricious, wholly a creature of historical anomaly. Sovereign immunity, long ago abandoned in England, the country of its inception, is today in retreat in this country, and State Supreme Courts have forthrightly recognized the gross injustices it perpetuates and have, therefore, struck it down as invalid.

Justice Traynor in the leading national decision of *Muskopf v. Corning Hospital District*, 55 C. 2d 211, 11

Cal.Rptr. 89, 359 P. 2d 457 (1961), wrote at page 216 and page 221, as follows:

"If the reason for *Russell v. Men of Devon* and the rule of county or local district immunity ever had any substance they have none today. Public convenience does not outweigh individual compensation . . .

"The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia . . .

"None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity. In fact, it does not exist. It has become riddled with exceptions, both legislative . . . and judicial . . . and the exceptions operate so illogically as to cause serious inequality. . ." (at page 217)

"Only the vestigial remains of such governmental immunity has survived; its requiem has long been foreshadowed. For years the process of erosion of governmental immunity has gone on unabated. The Legislature has contributed mightily to that erosion. The courts, by distinction and extension, have removed much of the force of the rule. **Thus, in holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law we make no startling break with the past but merely take the final step that carries to its conclusion an established legislative and judicial trend.**" (Emphasis added)

Therefore, not only is sovereign immunity inapplicable in this case, but the doctrine is in and of itself unconstitutional, as a matter of Equal Protection and as a matter of Due Process of Law.

## PLAINTIFF'S ALLEGATIONS SUFFICIENTLY SET FORTH THE STATE OF MIND REQUIRED OF DEFENDANTS BY THE CIVIL RIGHTS ACT

The Amended Complaint specifically charges all of the defendants with knowingly sending untrained troops with loaded weapons onto a college campus without any cause whatsoever, with the knowledge that there would be an imminent risk of injury and death to unarmed students, that these actions were done by all defendants, individually and in conspiracy, in complete and utter indifference and disregard for the lives of unarmed students, and that these acts were done with the specific intent of depriving plaintiff and plaintiff's decedent of their civil rights. In addition, the Amended Complaint further alleges that defendant Robert Canterbury intentionally and wilfully failed to take any action whatsoever under the circumstances, he being present with the troops on the campus at all times, and that his failure to prevent his troops from so conducting themselves was in wanton, reckless and callous disregard and indifference for the lives of unarmed civilians. The issue is whether or not these allegations sufficiently describe the state of mind required for liability under the Civil Rights Act.

It is specifically noted in *Bargainer, supra,* that there must be an intent to deprive plaintiff of a federal right. Such an intent has clearly been alleged against all defendants.

Nevertheless, a number of courts have held that an intent is not actually required. In *Monroe, supra,* the language of the United States Supreme Court is instructive:

> "It is abundantly clear that one reason the Legislation was passed was to afford a federal right in Federal

> Court caused by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced. . . and the immunities guaranteed by the Fourteenth Amendment might be denied by state agencies." (Emphasis added)

In *Daniels v. Van de Venter,* (C.A. Cols. 1967), 382 F.2d 29, the court quoted from *Monroe, supra,* stating that "intent is not a necessary element to be shown, but as in any tort action a defendant in an action under §1983 of the Civil Rights Act is responsible for the natural consequences of his act".

Similarly, in *Hardwick v. Hurley,* (7th Cir. 1961), 289 F.2d 529, the court held that the allegation of purpose with which an unconstitutional act is perpetrated is not a prerequisite to a suit under §1983. In accord are *Nelson v. Knox,* (6th Cir. 1958) 256 F.2d 312; *Cohen v. Norris, supra;* and *Joseph v. Prowlen,* (7th Cir. 1968) 402 F.2d 367.

In *Jenkins v. Averette,* 4th Cir., April 20, 1970, 38 L.W. 2607, the court upheld a right to recovery under the Civil Rights Act against a police officer in a shooting incident upon a showing by plaintiff of gross or culpable negligence. The Court reasoned "that if intent is required, it may be supplied for federal purposes by gross and culpable negligence just as it was supplied in the Common Law cause of action".

In *Striker v. Pancher,* (6th Cir. 1963), 317 F.2d 780, the court held that §1983 is aimed at "reprehensible action on the part of the defendant". See also *Brown v. U.S.,* 204 F.2d 247 (1953).

It would seem, therefore, that the allegations in the Amended Complaint meet the required state of mind under the Civil Rights Act; certainly these allegations give

rise to a fair inference of bad faith, but in the event that defendants are making the highly technical claim that "bad faith" has not been literally alleged, or if this court should have any question concerning the existence of an inference of "bad faith" either with respect to motive or intent, plaintiff is prepared to cure this concern with a specific allegation to that effect.

## THE STATE OF OHIO SPECIFICALLY ALLOWS A CAUSE OF ACTION UNDER STATE LAW AGAINST A MILITIAMAN FOR WANTON MISCONDUCT

O.R.C. Section 5923.37 reads as follows:

> "When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area **unless the act is one of willful or wanton misconduct.**" (Emphasis added)

Defendants have seemed to overlook in their Brief the unmistakable meaning of this Section. This Section does not provide for any immunity, once it is shown that there is wilful or wanton misconduct on the part of a member of the organized militia.

All three defendants are members of the organized militia. There can be no question that defendants Canterbury and Del Corso were ordered to duty by state authority, namely the Governor, and that they were members of the organized militia. As for defendant Rhodes, it would seem that he is both a civilian exercising power over the State Militia, as well as a member of the militia by virtue of his status as Commander-in-Chief.

Moreover, the acts alleged by plaintiff concerning all three defendants were definitely within the scope of their military duty.

In addition, defendant Canterbury was himself at the scene of the alleged disorder at Kent State, within the meaning of the Statute, and both defendant Rhodes and defendant Del Corso were at various times prior to the incident and at certain times alleged in the Amended Complaint on the scene, giving orders, taking actions, and making decisions, all of which resulted in the death in question.

It should be noted with respect to any actions alleged in the Amended Complaint which were not performed by any of the defendants "within the scope of their military duties" or "at the scene of any disorder within any designated area" that wanton misconduct would not be the applicable standard and the proper standard would be common law negligence. In other words, the wanton misconduct provision of O.R.C. §5923.37 is in reality a remedy for a specific circumstance and in the absence of that circumstance, the usual standard of negligence should apply.

While it would seem clear that the allegations in the Amended Complaint demonstrate wanton misconduct at the least, however, plaintiff will, nevertheless, review the authorities relevant to wanton misconduct.

In *Universal Concrete Pipe Co. v. Bassett*, 130 O.S. 567, 200 N.E. 843 (1936), the court defined wanton misconduct as follows:

> "Although actions for willful or wanton conduct have often been treated under the head of negligence actions, an action based upon willful or wanton misconduct is apart from the action for negligent conduct. The difference is one of kind, not merely degree . . . wanton

misconduct is such conduct as manifests a disposition to perversity and it must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious of such surrounding circumstances and existing conditions that his conduct will in all common probability result in injury".

In *Tighe v. Diamond*, 149 O.S. 520, A.D. N.E. 2d 122, (1948), the court defined wanton misconduct as comprehending "an entire absence of all care of the safety of others and indifference to consequence."

In *Zalewski v. Yancy*, 101 O.App. 501, 140 N.E. 2d 592 (1956), the court held that a probability of injury known to the defendant would meet the test of wanton misconduct under the Guest Statute.

In *Kellerman v. J.S. Durig Co.*, 176 O.S. 320, 199 N.E. 2d 562 (1964), the Ohio Supreme Court carefully defined wanton misconduct as follows:

"Wanton misconduct charged against a defendant implies a disposition to perversity and a failure to exercise any care toward those to whom a duty of care was owing when the probability that harm would result from such failure was great and such probability was actually known, **or in the circumstances ought to have been known to the defendant**". (Emphasis added)

See also the case of *Gossett v. Jackson*, 100 O. App. 2d 121, 226 N.E. 2d 142 (1965); *Reserve Trucking Co. v. Fairchild*, 128 O.S. 519, 191 N.E. 745 (1934); *White v. Harvey*, 170 O.S. 262, 163 N.E. 2d 898 (1960); *Botto v. Fischesser*, 174 O.S. 322, 189 N.E. 2d 127 (1963); *Roszman v. Sammet*, 20 O. App. 2d 255, 254 N.E. 2d 51 (1969).

Defendants cite O.R.C. Section 2923.55 as a basis for claiming immunity to defendants Del Corso and Canterbury. This Section has no applicability whatsoever to this case because it involves criminal liability rather than civil liability in the first place, and in the second place, it assumes a fact not fairly raised in the pleadings—namely, that defendants were "engaged in suppressing a riot or in dispersing or apprehending rioters." This would seem to be a question of fact for a jury to decide, based upon proper instructions as to the legal definition of a "riot" or "rioters". Also, the Amended Complaint does not fairly raise an inference that "any order to desist and disperse had been issued."

Finally, in an effort to avoid the application of aforementioned O.R.C. Section 5923.37, defendants are contending that the Second Cause of Action does not incorporate by reference the allegations of the First Cause of Action. This is a technical objection, even if at all valid, and should not lead this court to grant the Motion to Dismiss without allowing leave to make this minor amendment. However, it is, in fact, not true that plaintiff is unable to assert inconsistent allegations within the same cause of action.

With respect to Rule 8(e) (2), F.R.C.P., it is stated as follows in Wright and Miller, "FEDERAL PRACTICE AND PROCEDURE", Civil, at pages 371-373 of Section 1283:

> "Under Rule 8(e) (2), a party is permitted to set forth inconsistent statements either alternatively or hypothetically within a single count or defense or in separate claims or defenses. . . he also may set forth inconsistent legal theories in his pleading and will not be forced to select a single theory on which to seek recovery.

The court in *Michael v. Clark Equipment Co.*, 380 F. 2d 351, 2d Cir. 19, held at page 352:

> "The plaintiff is at liberty to refuse to be pinned down to a single theory of fraud, and inconsistency is not a tenable objection to a pleading . . ." Federal Rules of Procedure 8(3) (2).

Similarly, the court held at page 178 in *Breeding v. Massey*, 378 F. 2d 171 (8th Cir. 1967) as follows:

> "The right of a plaintiff to try his case on alternative theories has uniformly been upheld in the Federal Court, and plaintiff cannot be required to elect upon which theory to proceed."

If defendants' only objection is that plaintiff has not supplied separate causes of action—one cause of action for wanton misconduct and another cause of action for negligence—then plaintiff is perfectly willing to make such separate claims in separate causes of action to remedy any such formal objection which defendants are apparently making.

## CONCLUSION

The legal authorities cannot convey the depth of this tragedy, nor can they convey the imperative practical necessity of an open forum in Federal Court in this case. Though in a sense all cases are important to the litigant, it is suggested that the absence of a forum in this case would be a most unfortunate thing. It is plaintiff's position that the law applicable in this case clearly provides the avenue for redress, and for all of the reasons set forth in this Memorandum of Law, plaintiff moves that this

court overrule in all respects defendants' Motion to Dismiss.

Respectfully submitted,

/s/ STEVEN A. SINDELL, *of Counsel*
SINDELL, SINDELL, BOURNE, MARKUS, STERN & SPERO
1400 Leader Building
Cleveland, Ohio 44114—781-8700
*Attorneys for Plaintiff*

(Certificate of service omitted in printing)

## ANSWERS TO INTERROGATORIES IN KRAUSE CASE

(Filed May 7, 1971)

Civil Action C70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

Now come the defendants and specially appear in the above captioned proceeding for the sole purpose of submitting answers to the plaintiff's interrogatories. Defendants' motions to dismiss are presently pending before the Court; this special appearance by defendants is in no way to be construed as a waiver of defendants' immunity from suit as set forth in their motions to dismiss.

## ANSWERS TO INTERROGATORIES BY SYLVESTER DEL CORSO AND ROBERT CANTERBURY

1. State the name, address, unit and rank of each and every member of the Ohio National Guard who was situated in the immediate area in which guns were fired at the time of the shooting described in the Amended Complaint filed in this action.

ANSWER: Refer to Exhibit 1 attached hereto.

2. State the name, address, unit and rank of each and every member of the Ohio National Guard who fired a gun of any kind at the time and place of the shooting incident described in the Amended Complaint filed in this action.

ANSWER: Defendants refuse to answer Interrogatory No. 2 based upon their privilege against possible self-incrimination, United States Constitution, Amendment Five.

3. If for any reason you are unable to fully answer either Interrogatory Number One or Number Two state with specifity all of the reasons why you are unable to fully answer.

ANSWER: Refer to the answer to Interrogatory No. 2.

4. If for any reason you are unable to fully answer either Interrogatory Number One or Number Two, state whether or not there are any records, reports, documents, notes, transcriptions, writings, films or recordings of any kind known to you containing the answer to Interrogatories Numbers One and Two.

ANSWER: Defendants refuse to answer Interrogatory No. 4 based upon their privilege against pos-

sible self-incrimination, United States Constitution, Amendment Five.

5. If our answer to Interrogatory Number Three is in the affirmative, specify the precise nature of each and every record, report, document, note, transcription, writing, film or recording of any kind and specify the name and address of its present custodian.

ANSWER: Not applicable.

6. Are you aware of any recordings, photographs, reports, statements, transcriptions, notes, documents, films or other writings or tangible items of any kind in any way related or relevant to any of the matters set forth in the Amended Complaint?

ANSWER: Defendants refuse to answer Interrogatory No. 6 based upon their privilege against possible self-incrimination, United States Constitution, Amendment Five.

7. If your answer to Interrogatory Number Six is in the affirmative, then for each such record, photograph, report, statement, transcription, note, document, film or other writing, or tangible item of any kind state the following:

A. Its precise contents or nature;

B The name and address of its present custodian;

C. Whether you will make such item or writing available to plaintiff or to plaintiff's attorney without the necessity of a Motion to produce.

ANSWER: Not applicable.

8. Were any members of the Ohio National Guard injured in any way immediately prior to or during the fir-

ing of weapons at the time of the shooting described in the Amended Complaint filed in this action?

ANSWER: Yes.

9. If your answer to Interrogatory No. 8 is in the affirmative, state the name, address, unit and rank of each member of the Ohio National Guard who was injured.

ANSWER: Refer to Exhibit #2.

10. For each person mentioned in your answer to Interrogatory Number Nine, state the following:

A. The cause of injury;

ANSWER: As stated in Exhibit #2.

B. The name and address or other identification of the person or persons, if any, causing the injury;

ANSWER: Rioters on the Kent State University campus, May 4, 1970.

C. The approximate time the injury was sustained:

ANSWER: Immediately before the incident described in the Amended Complaint.

D. The location of the person injured at the time such injury was sustained;

ANSWER: To the best of our knowledge, on Blanket Hill, near the Pagoda, on the Kent State University campus.

E. The specific nature of the injury;

ANSWER: As stated in Exhibit #2.

F. The nature of treatment, if any, rendered for the injury;

ANSWER: Unknown to defendants at this time.

G. The medical facility, if any, where the treatment was rendered;

ANSWER: To the best of our knowledge, treatment was given to those injured at the Kent State University Medical Center.

H. The name and address of all persons who rendered any treatment whatsoever in connection with the injury;

ANSWER: To the best of our knowledge, treatment was rendered by Gary P. Dackor, 2 Lt. MC OARNG, Medical Platoon Leader.

I. The dates on which treatment was rendered;

ANSWER: To the best of our knowledge, May 4, 1970.

J. The name and address of each and every person who witnessed either the occurrence of the injury or the presence of the injury; and

ANSWER: Unknown to the defendants at this time other than stated above.

K. The name and present address of the present custodian of any photographs evidencing such injury.

ANSWER: Unknown to the defendants at this time.

11. Do you claim that anyone other than a member of the Ohio National Guard fired a gun of any kind immediately prior to or at the time of the shooting incident described in the Amended Complaint filed in this action?

ANSWER: Yes.

12. If your answer to Interrogatory Number Eleven is in the affirmative, then state with specificity and in detail the factual basis for any and all reasons for such

claim, including the names and addresses of any and all persons who have any knowledge supporting such claim.

ANSWER: General Canterbury heard non-military weapons discharged. Others reporting non-military firing were:

Michael Curtis Anderson, 3648 North Drive, Greenville, Ohio

John A. Bambeck, 991 Medina Road, Medina, Ohio

John D. McDermott, 521 Brown Street, Akron, Ohio

Clarence Harris, 620 Hudson Avenue, Akron, Ohio

Edward C. Meyer, 4751 East Hayes, Ravenna, Ohio

Joseph F. Bertholdi, c/o Kent State University Police Force, Kent, Ohio

Lowell Powers, 25042 Mahoning Road, Deerfield, Ohio

Warren Dale Miller, address unknown

13. If your answer to Interrogatory Number Eleven is other than in the affirmative or negative, then specify with particularity why you are unable to answer in either the affirmative or negative.

ANSWER: Not applicable.

14. Do you claim that plaintiff's decedent, Allison Krause, in any manner caused any injury whatsoever to any member of the Ohio National Guard who fired a weapon immediately prior to or at the time of the shooting described in the Amended Complaint?

ANSWER: Yes.

15. If your answer to Interrogatory Number Fourteen is in the affirmative, then state with specificity and in detail the factual basis for any and all reasons for such claim, including the names and address of any and all persons who have any knowledge supporting such claim.

ANSWER: Allison Krause was unknown to the defendants so that it is unknown whether she was one of those rioters who caused injury to members of the National Guard immediately prior to the incident described in the Amended Complaint.

16. If your answer to Interrogatory Number Fourteen is other than in the affirmative or negative, then specify with particularily why you are unable to answer in either the affirmative or negative.

ANSWER: Refer to Answer to Interrogatory #15.

17. Do you claim that plaintiff's decedent, Allison Krause, in any manner caused any member of the Ohio National Guard who fired a weapon immediately prior to or at the time of the shooting described in the Amended Complaint to fear serious injury or that his life was in danger?

ANSWER: Although Allison Krause was unknown to the defendants immediately prior to the incident described in the Amended Complaint, it is known that she was among the crowd menacing, threatening, and assaulting the National Guard and causing them actual injury and grave concern for their lives.

18. If your answer to Interrogatory Number Seventeen is in the affirmative, then state with specificity and in detail the factual basis for any and all reasons for such belief, including the names and addresses of any and all persons who have any knowledge supporting such claim.

ANSWER: Defendants refuse to answer Interrogatory No. 18 in its entirety based upon their privilege against possible self-incrimination, United States Constitution, Amendment Five. Defendants Del Corso and Canterbury base part of their knowledge on photographs they observed at the President's Commission

hearing relative to Kent State. These photographs showed Allison Krause with the rioters.

19. If your answer to Interrogatory Number Seventeen is other than in the affirmative or negative, then specify with particularity why you are unable to answer in either the affirmative or negative.

ANSWER: Not applicable.

20. State the name, address, unit and rank of the officer or officers in command of the members of the Ohio National Guard who fired their weapons at the time and place of the shooting incident described in the Amended Complaint.

ANSWER: Defendants refuse to answer Interrogatory No. 20 based upon their privilege against possible self-incrimination, United States Code, Amendment Five.

21. State the precise location of defendant Robert Canterbury at the time of the shooting described in the Amended Complaint.

ANSWER: General Canterbury was with the troops on "Blanket Hill" near the Pagoda.

22. Describe the clothing defendant Robert Canterbury was wearing at the time of the shooting described in the Amended Complaint.

ANSWER: Brown business suit with gas mask.

23. Was there any member of the Ohio National Guard on the Kent State University campus at the time of the shooting described in the Amended Complaint of higher rank than defendant Robert Canterbury?

ANSWER: no.

24. State the name, address, unit and rank of each and every member of the Ohio National Guard who was situated anywhere on the campus of Kent State University at any time on May 4, 1970, prior to and during the shooting incident described in the Amended Complaint.

ANSWER: Refer to Exhibit 1 attached hereto.

25. For each member of the Ohio National Guard mentioned in your answer to Interrogatory Number Twenty-Four, state:

A. The date upon which such member was most recently called into active duty prior to May 4, 1970.

B. The person or persons most recently ordering such member into active duty;

C. The reason for ordering such member into active duty;

D. The specific services rendered by each such member from the time such member was first called into active duty up to and including the time of the shooting incident described in the Amended Complaint;

E. The specific equipment, including weaponry of any kind which was possessed, used, or controlled by each such member including tear gas, guns, vehicles, knives, etc.;

F. The complete training history, including times, places, and the names and addresses of training instructors of such member;

G. The specific name, title and publisher of any and all materials, books, articles, guides, visual aids, instructions, or other tangible or written items of any kind assigned, used, or possessed, read by or

available to each such member in any way connected with his training or service with the Ohio National Guard.

ANSWER: The information contained in Exhibit 3 attached hereto is the only knowledge we presently have pertinent to Interrogatory No. 25 with the following additions:

(1) All men listed in Exhibit 3 had previously undergone basic training and advanced training;

(2) Concerning "G", we are not presently aware of all the items named therein, however, there are the "Guidelines for Small Unit Commanders" and the Army field manual on civil disorders.

26. Describe the specific nature and kind of weapon which was fired by each member of the Ohio National Guard who fired a weapon of any kind at the time and place of the shooting incident described in the Amended Complaint, specifying with particularity the name and address of the guardsman firing the weapon and the type of bullet which was fired from that weapon.

ANSWER: Defendants refuse to answer Interrogatory No. 26 based upon their privilege against possible self-incrimination, United States Constitution, Amendment Five.

27. Prior to May 4, 1970, did defendant Governor James Rhodes issue or promulgate any proclamation other than the Proclamation of April 29, 1970, attached as Exhibit 3 to Defendant's Motion to Dismiss?

ANSWER: Governor Rhodes promulgated two Proclamations relevant to the issues defined in the Amended Complaint. The first was issued April 29, 1970, and the second was a supplemental proclamation issued

May 5, 1970, formalizing the Governor's verbal orders to General Del Corso "to maintain peace and order and to protect life and property throughout the State of Ohio."

28. If your answer to Interrogatory Number Twenty-Seven is in the affirmative, describe with specificity each and every such proclamation stating its time, date, place and persons to whom issued or promulgated.

ANSWER: The supplemental proclamation which is also attached to defendant's Motion To Dismiss, Exhibit #3 was executed May 5, 1970, at Columbus, Ohio.

29. For each such aforementioned proclamation in your answer to Interrogatory Number Twenty-Eight, state the name and present address of the present custodian of same.

ANSWER: To the best of our Knowledge, Ted W. Brown, Secretary of State for the State of Ohio, has possession and custody of this proclamation.

30. State the name and address of each and every person who in any manner requested or ordered the presence of the Ohio National Guard on the Kent State University campus on May 4, 1970.

ANSWER: The number of persons requesting and/or ordering the assistance of the National Guard are too numerous to name here; such a list would include many of the citizens of Kent, Ohio. Most prominent among these persons would be:

(1) Governor Rhodes, Executive Proclamations of April 29 and May 5, 1970, Columbus, Ohio.

(2) Mayor LeRoy M. Satrom, Communication to the Commander of Troops of the Ohio National Guard, May 2, 1970.

(3) Portage County Sheriff Joseph Hegedus, Communication to the Commander of Troops of the Ohio National Guard, May 3, 1970.

31. For each such person mentioned in your answer to Interrogatory Number Thirty, state the date, time and place when such order or request was made, and the person or persons to whom and/or in the presence of whom such request or order was made.

ANSWER: Refer to answer to Interrogatory No. 30.

32. For each such person mentioned in your answer to Interrogatory Number Thirty, state fully the reasons, if any, given by that person for his or her request to order.

ANSWER: Governor Rhodes, as stated in his Executive Proclamation of May 5, 1970, ordered the National Guard to Kent State University to meet disorders or threatened disorders and to maintain peace and order in the city of Kent and on the campus of Kent State University is Portage County.

May Satrom ordered the National Guard to Kent, Ohio, because local law enforcement agencies could no longer cope with the situation in Kent May 2, 1970, and troops were needed to restore order and peace to the community.

Sheriff Hegedus requested the National Guard to help protect the persons and property of Kent, Ohio, since local enforcement agencies could no longer adequately protect persons and property in Kent, Ohio nor restore peace and order to this community.

33. Of your own personal knowledge, what were all of the reasons, if any, for the presence of Ohio National Guard troops on the Kent State University campus on

May 4, 1970, prior to and including the time of the shooting incident described in the Amended Complaint.

ANSWER: The Ohio National Guard was requested by various authorities to maintain the peace and order and to protect life and property in Kent, Ohio.

34. At any time or times on the Kent State University campus on May 4, 1970, prior to the shooting incident described in the Amended Complaint, did Ohio National Guard troops attempt to disperse any gathering or assemblage of students or other civilians (hereinafter to be referred to as a "gathering").

ANSWER: Yes.

35. If your answer to Interrogatory Number Third-Four is in the affirmative, state the name and address of each and every person (giving where applicable, unit and rank) who in any way ordered the dispersal of such "gathering" or "gatherings".

ANSWER: Immediately before the incident described in the Amended Complaint, General Canterbury directed a member of the Kent State University Police Department to order the rioters to disperse. Patrolman Harold A. Rice took a bullhorn and, while being driven by a National Guardsman in a jeep, passed many times in front of the rioters ordering them to disperse.

36. For each person mentioned in your answer to Interrogatory Number Thirty-Four, state:

A. The time when such order was given;

B. The place where such order was given;

C. The person or persons to whom such order was given (stating unit and rank where applicable, if any);

D. The specific reasons, if any, such order was given;

E. The manner in which the order was to be carried out;

F. The manner in which the order was in fact carried out; and

G. The substance of the order.

ANSWER: Refer to the Answer to Interrogatory No. 35.

37. Describe with specificity the hand and/or arm signal or signals which constitute an order to a member of the Ohio National Guard to shoot a gun.

ANSWER: a. Standing position, arms at waist with palms down, arms moved out and to the side.

b. Arm is brought overhead and down pointing to direction fire is to be made.

/s/ SYLVESTER DEL CORSO

/s/ ROBERT CANTERBURY

(Verification, certificate of service and exhibits omitted in printing)

Civil Action No. C70-816

# In the United States District Court

FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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ELAINE B. MILLER,
Administratrix of the Estate of
Jeffrey Glenn Miller, Deceased,
*Plaintiff,*

vs.

JAMES RHODES, etc., *et al.*,
*Defendants.*

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## RELEVANT DOCKET ENTRIES

8/24/70 Complaint filed. Summons issued. 4 copies of complaint to Marshal.

9/ 1/70 Notice of deft. Srp to take deposition of William W. Scranton on 9/10/70 filed. Copies mailed 9/1/70.

10/14/70 Summons retn. & filed. Served Robert White on 8/27/70, served Robt. Canterbury, Sylvester Del Corso & James Rhodes on 8/31/70. Fees $23.52.

11/16/70 Motion of defendants Del Corso, Canterbury, and White to dismiss with memo. in support filed. Copies mailed 11/13/70.

11/16/70 Motion of deft., James A. Rhodes, Governor, to dismiss with memorandum filed. Copy mailed 11/13/70.

1/19/71 Memorandum of pltf. in opposition to motion to dismiss filed. Copies mailed 1/19/71.

4/15/71 Motion of defts. to dismiss filed. Copy mailed 4/14/71.

6/ 2/71 Memorandum & Order filed. Connell, J. Complaint Dismissed at Pltf's Cost. Copies to Interested counsel. (See C70-544)

6/25/71 Notice of Appeal by pltf. filed. Copies to Brown, Alloway, & Lambros.

8/ 5/71 Certified record received in U.S.C.A. and filed. (8-3-71) (71-1623)

2/12/73 True copy of Judgment from U. S. Court of Appeals affirming judgment of District Court filed.

2/12/73 Opinion from U. S. Court of Appeals filed. (Record Returned)

## COMPLAINT IN MILLER CASE

(Filed August 24, 1970)

Civil Action No. C 70-816

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

### COMPLAINT

Plaintiff, ELAINE B. MILLER, by her attorney, JOSEPH KELNER and associate attorney, ABRAHAM D. SOAFER, for her complaint herein, alleges:

## AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff is a citizen of the State of New York, residing at 261-71 Langston Avenue, Borough of Queens, City of New York and is the duly appointed administratrix of the estate of JEFFREY GLENN MILLER, plaintiff's son, who died on May 4, 1970 at the age of 20, by reason of the actions of the defendants as hereinafter stated; plaintiff has been appointed administratrix of the estate of JEFFREY GLENN MILLER by the Surrogate's Court, Queens County, New York.

2. At all times herein mentioned, defendant RHODES was Governor of the State of Ohio and exercised certain powers and authority individually and as Governor of the State of Ohio and under color of the laws of the State of Ohio, as its agent, servant and employee.

3. At all times herein mentioned, the defendants, DEL CORSO, CANTERBURY, JONES, MARTIN, SRP, STEVENSON and the various officers and enlisted men of Troop G, G Company, 107th Armored Cavalry Regiment of the Ohio National Guard and A Company, First Battalion, 145th Infantry Regiment of the Ohio National Guard, were on active duty with the Ohio National Guard as officers and enlisted men therein and were acting under color of the laws of Ohio.

4. At all times herein mentioned, the defendant, WHITE, was President of Kent State University at Kent Ohio and exercised his powers and authority in such employment and under color of the laws of Ohio.

5. At all times mentioned herein, JEFFREY GLENN MILLER was a full time student at Kent State University; and on May 4, 1970 the said JEFFREY GLENN MILLER was shot and killed by a bullet fired by one of the members

of the Ohio National Guard in service on the campus at Kent State University; and at the time he was shot the said JEFFREY GLENN MILLER was not engaged in any riotous, aggressive, criminal, improper or provocative acts and was not contributorily negligent in causing his death.

6. This court has jurisdiction pursuant to Title 42, United States Code, Section 1983 and Title 28, United States Code, Sections 1331 and 1343 in that plaintiff's cause of action seeks redress for the deprivation under color of state law, of the life of JEFFREY GLENN MILLER, his rights, privileges and immunities secured by the Constitution of the United States, and it arises under Federal law, with the matter in controversy exceeding $10,000 exclusive of interest and costs.

7. At all times mentioned herein, Kent State University was a state university of Ohio, organized pursuant to the laws of Ohio and had its main campus in the City of Kent, Portage County, Ohio.

8. At all times mentioned herein on May 4, 1970 and prior thereto, the defendants, acting individually and in concert with each other and under color of the laws of the State of Ohio, subjected and caused the said JEFFREY GLENN MILLER to be subjected to the deprivation of his life, his rights, privileges and immunities secured by the Constitution and laws of the United States; that such deprivation was without due process of law in that, by reason of the defendants' actions on May 4, 1970 and prior thereto, plaintiff's decedent, JEFFREY GLENN MILLER, was shot and killed on May 4, 1970 by a bullet fired by one of the aforesaid National Guard members on duty on the campus of Kent State University; and the defendants intentionally, recklessly, willfully and wantonly engaged in the following acts among other things which caused or con-

tributed to the causing of the deprivation alleged herein; that they used and fired live ammunition with the intent to kill JEFFREY GLENN MILLER and other students lawfully upon the said campus; that the officers of the said National Guard ordered the use of said live ammunition and, upon information and belief, gave the orders to fire the same at the said time and place; that they thereby caused the death of the said JEFFREY GLENN MILLER; that by reason of the foregoing the plaintiff, individually and as administratrix of the estate of JEFFREY GLENN MILLER and other members of his family, were damaged and are entitled to compensatory damages in the amount of two million ($2,000,000) dollars and punitive damages in the amount of ($2,000,000) dollars against all of the defendants.

AS AND FOR A SECOND CAUSE OF ACTION

9. Plaintiff repeats, reiterates and realleges each and every allegation hereinabove contained in paragraphs (1) through (8) with the same force and effect as if fully set forth herein.

10. That all of the defendants were reckless, careless and negligent in their failure to take precautions to avoid the occurrence of such shooting; in permitting the use of firearms under the existing circumstances; in permitting the said firearms to be loaded with live ammunition under circumstances not justifying such use; in authorizing and permitting the use of illegal and excessive force and violence in relation to the situation prevailing upon the Kent State campus at such time; in the failure to order and prevent troops of the Ohio National Guard from firing live ammunition at unarmed persons thereat under such or similar circumstances without legal justification; in failure to require the establishment and promulgation of proper rules, regulations and standards which would pro-

hibit the unauthorized use and firing of firearms where the same was unjustified; in the promulgation of rules, regulations and training procedures applicable to civil disturbances which were vague, indefinite and confusing and which authorized and permitted troops to use firearms within their own discretion and without proper standards, safeguards, orders or training prohibiting such improper use of firearms; in the failure to establish and conduct proper training procedures to prevent the happening of such an occurrence; in providing improper and insufficient training of troops for duty under such circumstances; in creating an unreasonable and imminent risk of injury and death to students upon the campus, including JEFFREY GLENN MILLER; and all of the defendants were otherwise reckless, careless and negligent.

11. On May 4, 1970 various officers and enlisted men intentionally and without just cause or provocation, fired intentionally at the said JEFFREY GLENN MILLER and others with intent to kill, causing the death of JEFFREY GLENN MILLER on the campus of Kent State University, in violation of the statutes and laws in such cases made and provided.

12. By reason of the foregoing the plaintiff, individually and as administratrix of the estate of JEFFREY GLENN MILLER, and other members of his family, were damaged and are entitled to compensatory damages in the amount of two million ($2,000,000) dollars and punitive damages in the amount of ($2,000,000) dollars against all of the defendants.

WHEREFORE, plaintiff prays for judgment against all of the defendants jointly and severally for compensatory damages in the amount of two million ($2,000,000) dollars and punitive damages in the amount of two million

($2,000,000) dollars, together with the costs and disbursements of this action.

/s/ Steven A. Sindell
/s/ Joseph Kelner
Attorney for Plaintiff
217 Broadway
New York, New York 10007
(212) 233-7890

## MOTION TO DISMISS IN MILLER CASE

(Filed November 16, 1970)

Civil Action No. C70-816

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Eastern Division

(Title omitted in printing)

### MOTION TO DISMISS

Now come the defendants and respectfully move this Court, pursuant to Rule 12 b(1) of the Federal Rules of Civil Procedure, for an order dismissing both causes of action in the complaint herein because the Court lacks jurisdiction of the subject matter. These defendants are sued in their representative capacities as public officials and agents of the sovereign state of Ohio. Because it appears from the body of the complaint that the matter involved is one in which the State of Ohio is primarily concerned and will be affected by any judgment rendered herein, the action is one essentially against the State of Ohio

which has not consented to be sued by waiving its constitutional right to sovereign immunity.

Respectfully submitted,

CRABBE, NEWLON, POTTS, SCHMIDT, BROWN & JONES
42 East Gay Street
Columbus, Ohio 43215
Telephone: 228-5511
By /s/ CHARLES E. BROWN
*Attorney for Defendants Sylvester Del Corso, Robert Canterbury and Robert White*

(Memorandum in support of motion to dismiss omitted in printing)

## MOTION TO DISMISS IN MILLER CASE

(Filed November 16, 1970)

Civil Action No. C70-816

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

### MOTION TO DISMISS

1. Now comes the defendant, James A. Rhodes, Governor of the State of Ohio, and respectfully moves this Court, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for an order dismissing both of the alleged causes of action in the Complaint herein for the reasons:

(1) The Court lacks jurisdiction of the subject matter, because this defendant is sued in his representative capacity as a public official and agent of the sovereign state of Ohio; therefore, the action is one essentially against the State of Ohio which has not consented to be sued by waiving its constitutional right to sovereign immunity;

(2) That, as a matter of law, it affirmatively appears from the complaint of plaintiff that, while no negligent, willful or wanton act of defendant James A. Rhodes, Governor, has been committed, it further affirmatively appears that any act or omission on the part of Governor James A Rhodes, defendant herein, was remote from the injury to and death of plaintiff's decedent, and was separated therefrom by a substantial intervening cause.

Respectfully submitted,

TOPPER, ALLOWAY, GOODMAN, DELEONE & DUFFEY

By /s/ R. BROOKE ALLOWAY,

*Attorneys for Defendant James A. Rhodes, Governer of the State of Ohio*

(Memorandum in support of motion to dismiss omitted in printing)

## MOTION TO DISMISS IN MILLER CASE

(Filed April 15, 1971)

Civil Action No. C70-816

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

MOTION TO DISMISS

Now come the defendants, Major Harry D. Jones, Captain Raymond J. Srp, and Captain John E. Martin, duly commissioned officers of the Ohio National Guard, and respectfully move this Court, pursuant to Rule 12 (b) (1) of the Federal Rules of Civil Procedure for an order dismissing the Complaint herein because the Court lacks jurisdiction of the subject matter:

(a) These defendants are sued in their representative capacity as military officers and agents of the sovereign State of Ohio, because it appears from the caption and the body of the Complaint that the matter involved is one in which the State of Ohio is primarily concerned and will be affected by any judgment rendered herein, and the action is essentially against the State of Ohio, and the State of Ohio has not consented to be sued by waiving its constitutional right to sovereign immunity.

(b) Aside from Ohio being the real party in interest and therefore being immune to civil suits, defendants are thus immune to civil suits by the statutory law of the State of Ohio.

(c) It is evident from the body of the Complaint that while no negligent, willful, wanton actions of these defendants has been committed, and it affirmatively appears from the body of the Complaint that any act or omission to act by these defendants was remote from the injury to and death of plaintiff's decedent and was separated therefrom by a substantial intervening cause.

BERGER, KIRSCHENBAUM & LAMBROS
By /s/ C. D. LAMBROS
806 Citizens Building
Cleveland, Ohio 44114
621-0800
*Attorneys for Captain Raymond J. Srp*

/s/ DELMAR A. CHRISTENSEN
607 Second National Building
Akron, Ohio
*Attorney for Major Harry D. Jones and Captain John E. Martin*

## MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

In support of the foregoing Motion to Dismiss, the defendants adopt and incorporate herein all of the arguments contained in the Memorandum in Support of the Motion to Dismiss filed on behalf of another defendant by the firm of Topper, Alloway, Goodman, DeLeone and Duffey in the within cause, copy of which Memorandum is attached hereto and made a part hereof as if fully written out herein.

Respectfully submitted,

BERGER, KIRSCHENBAUM & LAMBROS

By /s/ C. D. LAMBROS

*Attorneys for Captain Raymond J. Srp*

/s/ DELMAR A. CHRISTENSEN

*Attorney for Major Harry D. Jones and Captain John E. Martin*

(Certificate of service and attached Memorandum omitted in printing)

## MEMORANDUM AND ORDER OF DISTRICT COURT, KRAUSE AND MILLER CASES

(Filed June 2, 1971)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE, Administrator of the Estate of ALLISON KRAUSE, deceased

*Plaintiff,*

v.

GOVERNOR JAMES RHODES, *et al.*,

*Defendants.*

Civil Action No. C 70-544

ELAINE B. MILLER, Administratrix of the estate of JEFFREY GLENN MILLER, deceased,

*Plaintiff,*

v.

JAMES RHODES, *et al.*,

*Defendants.*

Civil Action No. C 70-816

SARAH SCHEUER, Administratrix of the Estate of SANDRA LEE SCHEUER, deceased,

*Plaintiff,*

v.

JAMES RHODES, *et al.*,

*Defendants.*

Civil Action No. C 70-859

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MEMORANDUM AND ORDER

**Printer's Note:** The opinion and order of the District Court is appended to the Petition for a Writ of Certiorari herein, Docket No. 72-1318, at pages 34-46.

## OPINION OF THE COURT OF APPEALS KRAUSE AND MILLER CASES

(Filed November 17, 1972)

Nos. 71-1622-23-24

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 71-1622

ARTHUR KRAUSE, Administrator, etc.,
*Plaintiff-Appellant,*

v.

JAMES RHODES, Governor of the State of Ohio, *et al.*,
*Defendants-Appellees.*

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No. 71-1623

ELAINE B. MILLER, Administratrix, etc.,
*Plaintiff-Appellant,*

v.

JAMES RHODES, etc., *et al.*,
*Defendants-Appellees.*

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No. 71-1624

SARAH SCHEUER, Administratrix, etc.,
*Plaintiff-Appellant,*

v.

JAMES RHODES, Governor of the State of Ohio, *et al.*,
*Defendants-Appellees.*

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APPEALS FROM UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

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OPINION

**Printer's Note:** The opinion of the U. S. Court of Appeals is appended to the Petition for Writ of Certiorari in the case of *Sarah Scheuer v. James Rhodes, et al.*, Docket No. 72-914, at pages 1a-69a.

## JUDGMENT OF COURT OF APPEALS IN KRAUSE CASE

(Filed November 17, 1972)

No. 71-1622

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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ARTHUR KRAUSE, ETC. v. GOVERNOR JAMES RHODES, *et al.*

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JUDGMENT

**Printer's Note:** The judgment of the U. S. Court of Appeals is appended to the Petition for a Writ of Certiorari herein, Docket No. 72-1318, at page 28.

## JUDGMENT OF COURT OF APPEALS IN MILLER CASE

(Filed November 17, 1972)

No. 71-1623

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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ELAINE B. MILLER, ETC. v. JAMES RHODES, *et al.*

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JUDGMENT

**Printer's Note:** The judgment of the U. S. Court of Appeals is appended to the Petition for a Writ of Certiorari herein, Docket No. 72-1318, at page 30.

## ORDER OF COURT OF APPEALS DENYING PETITION FOR REHEARING, KRAUSE AND MILLER CASES

(Filed January 3, 1973)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1622

ARTHUR KRAUSE, ETC. v. JAMES RHODES, *et al.*

No. 71-1623

ELAINE B. MILLER, ETC. v. JAMES RHODES, *et al.*

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ORDER

**Printer's Note:** The order of the Court of Appeals denying rehearing is appended to the Petition for a Writ of Certiorari herein, Docket No. 72-1318, at pages 32-33.